RECORD AND BRIEFS

16-605

No. 16-____

IN THE
Supreme Court of the United States

TOWN OF CHESTER,
Petitioner,

v.

LAROE ESTATES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether intervenors participating in a lawsuit as of right under Federal Rule of Civil Procedure 24(a) must have Article III standing (as three circuits have held), or whether Article III is satisfied so long as there is a valid case or controversy between the named parties (as seven circuits have held).

PARTIES TO THE PROCEEDING

Town of Chester, petitioner on review, was the defendant-appellee below.

The Town Board of the Town of Chester and the Planning Board of the Town of Chester are listed on the court of appeals docket as defendants-appellees, but the district court had dismissed the claims against them at the time of the appeal. The court of appeals subsequently amended the caption of the case to list only Town of Chester as the defendant-appellee.

Laroe Estates, Inc., respondent on review, was the movant-appellant below.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION AND FEDERAL RULE OF CIVIL PROCEDURE INVOLVED 2

INTRODUCTION 3

STATEMENT 4

A. Intervention In Civil Litigation 4

B. Court Precedent On The Question Presented 5

C. Factual And Procedural Background 7

REASONS FOR GRANTING THE PETITION 9

I. THERE IS A DEEP AND ACKNOWLEDGED CIRCUIT SPLIT ON WHETHER PROPOSED INTERVENORS UNDER RULE 24(a) MUST POSSESS ARTICLE III STANDING 9

II. THE DECISION BELOW IS WRONG 19

III. THIS CASE PROVIDES THE IDEAL VEHICLE FOR THE COURT TO RESOLVE THIS IMPORTANT QUESTION 21

CONCLUSION 27

TABLE OF CONTENTS—Continued

Page

APPENDICES

APPENDIX A—July 6, 2016 Court of Appeals Opinion 1a

APPENDIX B—March 31, 2015 District Court Opinion 20a

TABLE OF AUTHORITIES

Page(s)

CASES:

Agric. Retailers Ass'n v. *U.S. Dep't of Labor*, No. 15-1326, 2016 WL 5315200 (D.C. Cir. Sept. 23, 2016) 21

Arizonans for Official English v. *Arizona*, 520 U.S. 43 (1997) 16, 21

Bethune Plaza, Inc. v. *Lumpkin*, 863 F.2d 525 (7th Cir. 1988) 5, 11, 19

Bldg. & Constr. Trades Dep't v. *Reich*, 40 F.3d 1275 (D.C. Cir. 1994) 19

Bond v. *Utreras*, 585 F.3d 1061 (7th Cir. 2009) 11

Brook Vill. N. Assocs. v. *Jackson*, No. 06-CV-046-JD, 2006 WL 3308328 (D.N.H. Nov. 13, 2006) 23

City of Chi. v. *FEMA*, 660 F.3d 980 (7th Cir. 2011) 11, 18, 20, 21

City of Cleveland v. *Nuclear Regulatory Comm'n*, 17 F.3d 1515 (D.C. Cir. 1994) 13, 19

Deutsche Bank Nat'l Tr. Co. v. *FDIC*, 717 F.3d 189 (D.C. Cir. 2013) 13

Diamond v. *Charles*, 476 U.S. 54 (1986) ..... *passim*

Dillard v. *Chilton Cty. Comm'n*, 495 F.3d 1324 (11th Cir. 2007) 16, 17

Fontenot v. *McCraw*, 777 F.3d 741 (5th Cir. 2015) 19

TABLE OF AUTHORITIES—Continued

Page(s)

Forest Cty. Potawatomi Cmty. v. *United States*, No. CV 15-105 (CKK), 2016 WL 1465324 (D.D.C. Apr. 14, 2016) 22

Fund for Animals, Inc. v. *Norton*, 322 F.3d 728 (D.C. Cir. 2003) 13

Hollingsworth v. *Perry*, 133 S. Ct. 2652 (2013) 16, 20, 21

In re Endangered Species Act Section 4 Deadline Litig.-MDL No. 2165, 704 F.3d 972 (D.C. Cir. 2013) 13, 18

In re Idaho Conservation League, 811 F.3d 502 (D.C. Cir. 2016) 22

Jansen v. *City of Cincinnati*, 904 F.2d 336 (6th Cir. 1990) 15

Keith v. *Daley*, 764 F.2d 1265 (7th Cir. 1985) 11

King v. *Governor of New Jersey*, 767 F.3d 216 (3d Cir. 2014) 16, 17

Lewis v. *Casey*, 518 U.S. 343 (1996) 19

Liddell v. *Bd. of Educ. of City of St. Louis*, No. 4:72CV100 HEA, 2016 WL 3913762 (E.D. Mo. July 20, 2016) 22

Local No. 93 v. *City of Cleveland*, 478 U.S. 501 (1986) 5

McConnell v. *FEC*, 540 U.S. 93 (2003) ..... *passim*

Mich. State AFL-CIO v. *Miller*, 103 F.3d 1240 (6th Cir. 1997) 15

TABLE OF AUTHORITIES—Continued

Page(s)

Mo. Coal. for the Env't Found. v. *Mccarthy*, No. 2:16-CV-04069-NKL, 2016 WL 3566253 (W.D. Mo. June 27, 2016) 22

NAACP v. *Duplin Cty.*, No. 7:88-CV-00005-FL, 2012 WL 360018 (E.D.N.C. Feb. 2, 2012) 23

Nw. Forest Res. Council v. *Portland Audubon Soc'y*, No. 88-1751, 1989 WL 1174212 (Apr. 22, 1989) 25

Perry v. *Schwarzenegger*, 630 F.3d 898 (9th Cir. 2011) 15

Planned Parenthood of Mid-Mo. & E. Kan., Inc. v. *Ehlmann*, 137 F.3d 573 (8th Cir. 1998) 12

Purnell v. *City of Akron*, 925 F.2d 941 (6th Cir. 1991) 15

Rio Grande Pipeline Co. v. *FERC*, 178 F.3d 533 (D.C. Cir. 1999) 5

Ruiz v. *Estelle*, 161 F.3d 814 (5th Cir. 1998) 14, 15, 18

S. Christian Leadership Conference v. *Kelley*, 747 F.2d 777 (D.C. Cir. 1984) 13

San Juan Cty. v. *United States*, 503 F.3d 1163 (10th Cir. 2007) 16, 18

Sherman v. *Town of Chester*, 752 F.3d 554 (2d Cir. 2014) 8

Sierra Club v. *Glickman*, 82 F.3d 106 (5th Cir. 1996) 15

TABLE OF AUTHORITIES—Continued

Page(s)

Solid Waste Agency v. *U.S. Army Corps of Eng'rs*, 101 F.3d 503 (7th Cir. 1996)..... 11, 20

South Carolina v. *North Carolina*, 558 U.S. 256 (2010) 5

South Dakota v. *Ubbelohde*, 330 F.3d 1014 (8th Cir. 2003) 12

Steward v. *Abbott*, No. 5:10-CV-1025-OLG, 2016 WL 4771311 (W.D. Tex. May 17, 2016)..... 22

Stone v. *First Union Corp.*, 371 F.3d 1305 (11th Cir. 2004) 17

Tarsney v. *O'Keefe*, 225 F.3d 929 (8th Cir. 2000) 12

Timber View Props., Inc. v. *M&T Prop. Invs. Ltd.*, No. 2:15-CV-2855, 2016 WL 4472771 (S.D. Ohio Aug. 25, 2016)..... 22

United States v. *36.96 Acres of Land*, 754 F.2d 855 (7th Cir. 1985) 11

United States v. *Metro. St. Louis Sewer Dist.*, 569 F.3d 829 (8th Cir. 2009) 12, 17, 18

United States v. *Philip Morris USA Inc.*, 566 F.3d 1095 (D.C. Cir. 2009) 18

U.S. Olympic Comm. v. *Intelicense Corp., S.A.*, 737 F.2d 263 (2d Cir. 1984)..... 8, 26

Utah Ass'n of Cntys. v. *Clinton*, 255 F.3d 1246 (10th Cir. 2001) 17

Valley Forge Christian Coll. v. *Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982) 20

TABLE OF AUTHORITIES—Continued

Page(s)

Wittman v. *Personhuballah*,
136 S. Ct. 1732 (2016) 21

Wolfchild v. *United States*,
77 Fed. Cl. 22 (2007) 23

Yniguez v. *Arizona*,
939 F.2d 727 (9th Cir. 1991) 16

CONSTITUTIONAL PROVISIONS:

U.S. Const., art. III, § 2, cl. 1 ..... *passim*

STATUTES:

28 U.S.C. § 1254(1) 2

RULES:

Fed. R. Civ. P. 24 ..... *passim*

Fed. R. Civ. P. 24(a) ..... *passim*

Fed. R. Civ. P. 24(a)(1) 14

Fed. R. Civ. P. 24(a)(2) ..... *passim*

Fed. R. Civ. P. 24(b) 4, 8, 16

Fed. R. Civ. P. 24(b)(1) 4

Fed. R. Civ. P. 24(b)(2) 4

OTHER AUTHORITIES:

7C Charles Alan Wright et al., *Federal Practice and Procedure* § 1920
(3d ed. Apr. 2016 update) 4, 5, 10, 19

Renee Choy Ohlendor, Am. Bar Ass'n, Litigation News, *Intervenors Still in Limbo on Standing Requirements*
(Mar. 26, 2012) 24

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

The Town of Chester respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The Second Circuit's opinion (Pet. App. 1a-19a) is reported at 828 F.3d 60. The district court's opinion denying Laroe Estates, Inc.'s motion to intervene (Pet. App. 20a-59a) is not published in the *Federal Supplement*.

JURISDICTION

The judgment of the Second Circuit was entered on July 6, 2016. On September 23, 2016, Justice Ginsburg extended the time within which to file a petition

for a writ of certiorari to and including November 3, 2016. *See* No. 16A303. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

Article III, Section 2, Clause 1 of the U.S. Constitution states:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Federal Rule of Civil Procedure 24(a) provides:

> (a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:
>
> (1) is given an unconditional right to intervene by a federal statute; or
>
> (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of

> the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

INTRODUCTION

This Court, on two separate occasions, has "reserv[ed] * * * for another day" the question whether an entity must have independent Article III standing to intervene as of right in federal civil litigation. *McConnell* v. *FEC*, 540 U.S. 93, 233 (2003), *overruled on other grounds by Citizens United* v. *FEC*, 558 U.S. 310 (2010) (citing *Diamond* v. *Charles*, 476 U.S. 54, 68-69 n.21 (1986)). The day to resolve that important and difficult question has come.

Almost every court of appeals in the country has weighed in on the issue—ten in total—and they are hopelessly divided. Three courts of appeals hold that intervenors as of right must have independent Article III standing (the Seventh, Eighth, and D.C. Circuits), and seven hold that they do not (the Second, Third, Fifth, Sixth, Ninth, Tenth, and Eleventh Circuits). *See* Pet. App. 7a-8a. Courts on both sides of the divide have reached or reaffirmed their respective positions within the past few years, and in the process, they have attempted to read between the lines of this Court's decisions acknowledging but not deciding the issue. This conflict should not be allowed to continue. Without resolution, identical requests for intervention will continue to meet different results based on nothing more than geography. This is not the way a coherent legal system should operate, particularly on a foundational gatekeeping question, and it is surely not what Congress

intended when it approved Rule 24. This Court should therefore grant the petition and clarify whether intervenors as of right must have independent Article III standing.

STATEMENT

A. Intervention In Civil Litigation.

Rule 24 of the Federal Rules of Civil Procedure provides a mechanism by which an outside entity may intervene in a case and thereby participate "as if [it] were an original party." 7C Charles Alan Wright et al., *Federal Practice and Procedure* § 1920 (3d ed. Apr. 2016 update). The Rule offers two different routes to intervention. Rule 24(a) provides for "intervention as of right": a court "must permit anyone to intervene" in a suit who either "(1) is given an unconditional right to intervene by a federal statute" or "(2) claims an interest relating to the property or transaction that is the subject of the action" that would be "impair[ed] or impede[d]" if intervention were not granted. Fed. R. Civ. P. 24(a). Rule 24(b) allows for "permissive intervention," stating that a court "may permit" a person to intervene whenever a statute gives that person "a conditional right to intervene," or when the person "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1); *see also* Fed. R. Civ. P. 24(b)(2) (authorizing permissive intervention by government officers and agencies in certain circumstances).

Once an entity is authorized to intervene in a suit, it acquires "equal standing with the original parties" and "is entitled to litigate fully on the merits." Wright, *supra*, § 1920. An intervenor can make

discovery requests, raise new claims, demand relief, withhold its consent for settlement, win attorney's fees, and exercise the numerous other privileges afforded to litigants in federal court. *See id.* §§ 1920-1921; *see also Local No. 93* v. *City of Cleveland*, 478 U.S. 501, 529-530 (1986) (discussing authority of intervenors to block settlement); *Bethune Plaza, Inc.* v. *Lumpkin*, 863 F.2d 525, 531 (7th Cir. 1988) (discussing authority of intervenors to demand separate relief and attorney's fees); *see generally South Carolina* v. *North Carolina*, 558 U.S. 256, 287-288 (2010) (Roberts, C.J., concurring in the judgment in part and dissenting in part) ("Intervenors do not come alone—they bring along more issues to decide, more discovery requests * * * [and] make[] settling a case more difficult."). In contrast with *amici curiae*, intervenors are not limited to making arguments in support of claims and defenses raised by others; they are parties themselves, with their own substantial "control of the suit." *Bethune Plaza*, 863 F.2d at 531; *see also Rio Grande Pipeline Co.* v. *FERC*, 178 F.3d 533, 539 (D.C. Cir. 1999) (contrasting intervenors with *amici*).

B. Court Precedent On The Question Presented.

The question presented asks whether Rule 24(a) intervenors must have independent Article III standing. The Court has identified the question as an unresolved one on two separate occasions, but each time, it decided the case on other grounds.

In the first case, *Diamond*, the Court concluded that it lacked jurisdiction to entertain an appeal brought by a private defendant-intervenor (Eugene Diamond) in support of a state criminal law after the

named state defendant dropped out of the case. 476 U.S. at 56. The Court explained that "an intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art[icle] III." *Id.* at 68. Diamond failed to meet these requirements: "Because a private party whose own conduct is neither implicated nor threatened by a criminal statute has no judicially cognizable interest in the statute's defense," the Court dismissed the appeal "for want of jurisdiction." *Id.* at 56.

In its opinion, the *Diamond* Court recognized that there was uncertainty in the law over whether an intervenor must always possess independent Article III standing. *See id.* at 68-69. The Court noted that this question had "led to anomalous decisions in the Courts of Appeals," with some saying that standing is required and others "resolving intervention questions without reference to standing doctrine." *Id.* at 68 & n.21. But the Court found that it "need not decide today whether a party seeking to intervene before a District Court must satisfy not only the requirements of Rule 24(a)(2), but also the requirements of Art[icle] III." *Id.* at 68-69. Because the intervenor clearly had to satisfy Article III's requirements in the circumstances of that case (the absence of the continued participation of the supported party), the Court declined to resolve the broader question. *Id.*

In a second case, *McConnell*, the Court once again noted that the question was unresolved. That case involved a challenge to federal legislation regulating political contributions, and the proponents and

drafters of that legislation intervened in support of the defendant (the Federal Election Commission, or FEC). 540 U.S. at 160-161. Before this Court, one of the plaintiffs "argue[d] that the District Court's grant of intervention to the intervenor-defendants, pursuant to Federal Rule of Civil Procedure 24(a) * * * , must be reversed because the intervenor-defendants lack Article III standing." *Id.* at 233. The Court concluded that it "need not address" the issue, however, because the intervenor-defendants' position was "identical to the FEC's" and thus had no bearing on the Court's authority to resolve the questions presented. *Id.* As in *Diamond*, the Court "reserv[ed] the question for another day." *Id.* (citing *Diamond*, 476 U.S. at 68-69 n.21). This case now squarely presents the question left undecided in *Diamond* and *McConnell*.

C. Factual And Procedural Background.

In 2000, a project developer named Steven Sherman applied to the Town of Chester Planning Board for approval of a 385-unit housing subdivision. Pet. App. 22a. Laroe Estates, Inc. (Laroe) in turn agreed to purchase three parcels of that subdivision once Mr. Sherman secured approval for the development. *Id.* at 3a. Laroe committed to making interim payments to Mr. Sherman while he was pursuing approval in exchange for a mortgage on the property. *Id.* The proposed subdivision never received approval, however, and Mr. Sherman defaulted on his repayment obligations to the senior mortgage holder on his property, TD Bank. *Id.* The bank commenced foreclosure proceedings on the property and took possession following a foreclosure sale in 2014. *Id.* at 3a-4a.

Before the foreclosure, Mr. Sherman filed suit against the Town (as well as its Town Board and Planning Board, both of which were dismissed from the case as non-suable entities). *Id.* at 1a n.*, 2a, 20a-21a n.1. He alleged that the Town wrongfully prevented him from developing his property into a subdivision by repeatedly amending its zoning laws in a manner that was targeted against his project. *Id.* at 21a-22a. He pleaded, among other things, a regulatory-takings claim. *Id.*

The district court dismissed Mr. Sherman's regulatory-takings claim as unripe because the Town had not yet reached a final decision on his development project. *Id.* at 2a, 23a-24a. The Second Circuit reversed on the ground that it would be futile for Nancy Sherman (Mr. Sherman's widow, who took over as plaintiff when Mr. Sherman passed away) to seek a final decision, due to the Town's repeated changes to its zoning laws. *Sherman* v. *Town of Chester*, 752 F.3d 554, 568-569 (2d Cir. 2014).

The case returned to the district court, and Laroe moved to intervene as of right under Federal Rule of Civil Procedure 24(a)(2) or, alternatively, with the court's permission under Rule 24(b). Pet. App. 5a. Laroe argued that it was a contract vendee of the Sherman property and therefore had a sufficient equitable interest in the property to assert a takings claim against the Town. *Id.* at 54a. The district court disagreed. It denied Laroe's motion to intervene based on longstanding circuit precedent holding that, under Article III, "contract vendees lack standing to assert a takings claim." *Id.* at 55a (citing *U.S. Olympic Comm.* v. *Intelicense Corp., S.A.*, 737 F.2d 263, 268 (2d Cir. 1984)).

The Second Circuit vacated and remanded. *Id.* at 19a. The panel identified the relevant holding on review as the district court's determination that "a party seeking to intervene as of right must independently have standing." *Id.* at 6a. It then observed that nine courts of appeals had already "addressed this issue," resulting in a three-to-six "circuit split" that "has persisted for some time." *Id.* at 7a-8a (citing cases). Ultimately, the Second Circuit joined the circuits holding that standing is not required for intervention under Rule 24. *Id.* at 8a-9a. The court described this approach as most consistent with circuit precedent and supported by the fact that, in its view, this Court "has *sub silentio* permitted parties to intervene in cases that satisfy the 'case or controversy' requirement without determining whether those parties independently have standing." *Id.* at 8a (citing *McConnell*, 540 U.S. at 233). The Second Circuit therefore concluded that the district court "erred by denying Laroe's motion to intervene based on [Laroe's] failure to show it had Article III standing." *Id.* at 8a-9a.

This petition followed.

REASONS FOR GRANTING THE PETITION

I. THERE IS A DEEP AND ACKNOWLEDGED CIRCUIT SPLIT ON WHETHER PROPOSED INTERVENORS UNDER RULE 24(a) MUST POSSESS ARTICLE III STANDING.

1. The question presented in this case is subject to a widely acknowledged divide among the courts of appeals. Whereas "some courts have ruled that, in addition to satisfying the requirements of Rule 24(a), [an] intervenor must have Article III standing[,] * * *

[o]ther courts have held that standing is not required." Wright, *supra*, § 1908. As discussed above, the Court has twice identified the issue as an unresolved question of federal law. In *Diamond*, the Court acknowledged that "[t]he Courts of Appeals have reached varying conclusions as to whether a party seeking to intervene as of right must himself possess standing." 476 U.S. at 68 n.21. Because the case could be decided on other grounds, however, *Diamond* "reserv[ed] the question for another day." *McConnell*, 540 U.S. at 233 (describing *Diamond*). Then again in *McConnell*, the Court identified as an open question whether a Rule 24(a) intervenor must have Article III standing. *Id.* But once more, the Court concluded that it "need not address" the issue in that case because it would not change the outcome. *Id.*

In the meantime, courts of appeals *have* been deciding the issue, trying to parse this Court's rulings or, as in the decision below, deciphering what the Court "has *sub silentio* permitted." Pet. App. 8a. The courts of appeals are now divided three-to-seven on the question, and this split has led to divergent results on a range of recurring fact patterns—from cases involving environmental regulations and land-condemnation proceedings to cases involving prison conditions and hunting licenses. The result is that, in many circumstances, an entity's ability to intervene in a lawsuit (and thereby engage in discovery, demand relief, and otherwise participate on equal footing with the named parties) hinges entirely on the circuit in which the case is filed. The basic rules of federal civil procedure, and the minimum requirements for participating in federal litigation, should not vary from one city's courthouse to anoth-

er's. The Court should grant certiorari to bring clarity to this critical area of the law.

2. Three courts of appeals—the Seventh, Eighth, and D.C. Circuits—hold that entities cannot intervene as of right under Rule 24(a) unless they also have Article III standing.

In the Seventh Circuit, "standing is necessarily a component of intervention as of right under Rule 24(a)." *Bond* v. *Utreras*, 585 F.3d 1061, 1069-70 (7th Cir. 2009); *see, e.g.*, *City of Chi.* v. *FEMA*, 660 F.3d 980, 984-985 (7th Cir. 2011) ("the intervenor must have Article III standing even" if the "existing parties remain in the case"). The court has therefore adopted "the requirement that the interest of the person seeking intervention as a matter of right must be 'direct, significant, and legally protectable' " to ensure that "the would-be intervenor will not be permitted to push out the already wide boundaries of Article III standing." *Solid Waste Agency* v. *U.S. Army Corps of Eng'rs*, 101 F.3d 503, 507 (7th Cir. 1996). Applying this rule in *United States* v. *36.96 Acres of Land*, 754 F.2d 855 (7th Cir. 1985), the court rejected an environmental organization's motion to intervene in a condemnation action that the organization claimed would harm its "aesthetic and environmental interest[s]." *Id.* at 859. Those interests, the court explained, were not "sufficient to satisfy the standing requirement," and so could not supply the "direct, substantial, and legally protectable" interest needed to intervene under Rule 24(a). *Id.*; *see also Bethune Plaza*, 863 F.2d at 530-531 (rejecting motion to intervene by an entity "worried about [the] *stare decisis*" effect of litigation on unrelated suits); *Keith* v. *Daley*, 764 F.2d 1265, 1269 (7th Cir.

1985) (rejecting motion to intervene by an organization seeking to intervene on the ground that it acted "as chief lobbyist *** in favor of" a statute being challenged).

The Eighth Circuit likewise holds that "a party seeking to intervene must establish Article III standing in addition to the requirements of Rule 24." *United States* v. *Metro. St. Louis Sewer Dist.*, 569 F.3d 829, 833 (8th Cir. 2009); *see, e.g.*, *South Dakota* v. *Ubbelohde*, 330 F.3d 1014, 1023 (8th Cir. 2003) ("A party seeking to intervene must establish both that it has standing to complain and that the elements of Rule 24(a)(2) are met."). The Court has repeatedly denied motions to intervene because the proposed intervenors do not satisfy that constitutional requirement. Thus, in *Tarsney* v. *O'Keefe*, 225 F.3d 929 (8th Cir. 2000), the Eighth Circuit concluded that state legislators could not intervene in litigation "based on their legislative involvement" with a statute being challenged, because such involvement was insufficient to supply "legislator standing" under Article III. *Id.* at 939; *see also Planned Parenthood of Mid-Mo. & E. Kan., Inc.* v. *Ehlmann*, 137 F.3d 573, 578 (8th Cir. 1998) (similar). And in *Metropolitan St. Louis Sewer District*, the court rejected a trade association's effort to intervene in a suit on the basis of anticipated harms to its members because those harms were too "conjectural" and "hypothetical" to establish "Article III standing." 569 F.3d at 836; *see also id.* at 837-838 (explaining that the association would need to satisfy these requirements even if a federal statute "confer[red] an 'unconditional right to intervene'").

The D.C. Circuit agrees. "[I]n addition to establishing its qualification for intervention under Rule 24(a)(2), a party seeking to intervene as of right must demonstrate that it has standing under Article III of the Constitution." *Fund for Animals, Inc.* v. *Norton*, 322 F.3d 728, 731-732 (D.C. Cir. 2003). In its earliest case applying this principle, the D.C. Circuit held that a senator could not intervene in a case concerning the disposition of electronic recordings of Dr. Martin Luther King, Jr., "because the [senator] lack[ed] a protectable interest sufficient to confer standing." *S. Christian Leadership Conference* v. *Kelley*, 747 F.2d 777, 778 (D.C. Cir. 1984) (per curiam). The court has since invoked Article III standing requirements as the basis for denying numerous motions to intervene, including by a hunters' group seeking to challenge a species-listing procedure that might "lead to the listing of three game species," *In re Endangered Species Act Section 4 Deadline Litig.-MDL No. 2165* (*Section 4 Deadline Litig.*), 704 F.3d 972, 976, 979 (D.C. Cir. 2013) (concluding that the group "lacked standing and therefore was ineligible to intervene as of right" because it "ha[d] failed to identify a violation of a procedural right" (citation omitted)); by a bank raising a "hopelessly conjectural" concern that the named parties would reach a settlement unfavorable to it, *Deutsche Bank Nat'l Tr. Co.* v. *FDIC*, 717 F.3d 189, 193-194 (D.C. Cir. 2013) (explaining that the proposed intervenors do not "have standing under Article III"); and by a power company "concern[ed] about the precedential effect of an adverse decision," *City of Cleveland* v. *Nuclear Regulatory Comm'n*, 17 F.3d 1515, 1515-16 (D.C. Cir. 1994) (per curiam) (explaining that this interest "is not sufficient to confer standing").

Each of these three circuits, then, views Article III standing as a prerequisite for intervention under Rule 24. And each one has rejected motions to intervene filed by entities that they found to lack constitutional standing.

3. In sharp contrast with these courts, the Second, Third, Fifth, Sixth, Ninth, Tenth, and Eleventh Circuits have each held that entities do not need Article III standing to intervene in a lawsuit under Rule 24.

The Second Circuit joined the circuit divide in the decision below. It recognized that "a circuit split * * * has persisted for some time" on the question whether "a party seeking to intervene as of right must independently have standing." Pet. App. 6a, 8a. Reaching that question explicitly for the first time, the Second Circuit concluded that "[t]he answer is no." *Id.* at 2a; *see also id.* at 6a, 7a n.1 (noting that the Second Circuit had previously "suggested somewhat" that standing was not required). Accordingly, the panel permitted Laroe's motion for intervention to proceed notwithstanding that the court was unable to conclude "that Laroe had *an*[y] interest in the property" that is the subject of this dispute. *Id.* at 15a (emphasis added).

The Fifth Circuit also holds that Article III generally "does not require intervenors to independently possess standing." *Ruiz* v. *Estelle*, 161 F.3d 814, 830 (5th Cir. 1998). It has therefore concluded that state legislators could intervene under Rule 24(a)(1) in a suit concerning Texas prison conditions, even though "[i]t [wa]s doubtful" that they "ha[d] sufficient standing" to satisfy Article III. *Id.* at 829. Indeed, the Fifth Circuit explained, even "assum[ing] * * * that

[the legislators did] *not* have such standing," it would still permit intervention because "Article III does not require intervenors to independently possess standing where the intervention is into a subsisting and continuing Article III case or controversy." *Id.* at 830 (emphasis added); *see also Sierra Club* v. *Glickman*, 82 F.3d 106, 109-110 (5th Cir. 1996) (holding that courts must grant intervention to a party concerned about the potential "*stare decisis* effects of an adverse judgment," even if future courts "w[ould] not be bound by the outcome of" the suit, because such a decision "could be relied upon as precedent").

The Sixth Circuit, too, has held that "an intervenor need not have the same standing necessary to initiate a lawsuit"; on the contrary, it takes "a rather expansive notion of the interest sufficient to invoke intervention of right." *Mich. State AFL-CIO* v. *Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997); *see also Purnell* v. *City of Akron*, 925 F.2d 941, 948 (6th Cir. 1991) (similar). For example, like the Fifth Circuit—and in contrast with the Seventh and D.C. Circuits—the Sixth Circuit holds that "the possibility of adverse stare decisis effects provides intervenors with sufficient interest to join an action." *Jansen* v. *City of Cincinnati*, 904 F.2d 336, 342 (6th Cir. 1990); *see also Mich. State AFL-CIO*, 103 F.3d at 1247 (allowing an interest group to intervene in a suit in part because it was "a vital participant in the political process that resulted in [the] adoption" of the law at issue).

The Ninth Circuit takes a similar view. It says that, "[i]n general, an applicant for intervention need not establish Article III standing to intervene." *Perry* v. *Schwarzenegger*, 630 F.3d 898, 906 (9th Cir.

2011) (per curiam); *see also Yniguez* v. *Arizona*, 939 F.2d 727, 735 (9th Cir. 1991). It thus applies "a virtual *per se* rule that the sponsors of a ballot initiative have a sufficient interest in the subject matter of litigation concerning the initiative to intervene pursuant to Fed. R. Civ. P. 24(a)," *Yniguez*, 939 F.2d at 733, notwithstanding that such an interest is often insufficient to establish Article III standing. *See Hollingsworth* v. *Perry*, 133 S. Ct. 2652, 2663 (2013) (concluding that the sponsors of a ballot initiative "ha[d] no 'personal stake' in defending [the law's] enforcement that is distinguishable from the general interest of every citizen of California" and thus lacked Article III standing); *see also Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 66 (1997) (similar).

The Third, Tenth, and Eleventh Circuits have all issued similar holdings. *See King* v. *Governor of New Jersey*, 767 F.3d 216, 245 (3d Cir. 2014) (holding that "an intervenor is not required to possess Article III standing to participate"); *San Juan Cty.* v. *United States*, 503 F.3d 1163, 1172 (10th Cir. 2007) (en banc) ("[P]arties seeking to intervene under Rule 24(a) or (b) need not establish Article III standing."); *Dillard* v. *Chilton Cty. Comm'n*, 495 F.3d 1324, 1337 (11th Cir. 2007) (per curiam) ("[A]n intervenor need not make an independent showing that he or she meets the standing condition of Article III."). And like the others on the long side of the split, these courts have permitted intervention in circumstances where Article III standing is plainly lacking—holding, for instance, that environmental organizations could intervene in a suit challenging a particular national monument because "the *stare decisis* effect of the district court's judgment" might impair

the organizations' interest in "seeking presidential designation of *other* national monuments in the future." *Utah Ass'n of Cntys.* v. *Clinton*, 255 F.3d 1246, 1254 (10th Cir. 2001) (citation omitted); *see also Stone* v. *First Union Corp.*, 371 F.3d 1305, 1310-11 (11th Cir. 2004) (holding that "the potential for negative stare decisis" justifies intervention even if another court "would not be bound" by the decision at issue, because that decision might "have significant persuasive effects" that "could influence later suits"); *King*, 767 F.3d at 246 (holding that an advocacy group "need not demonstrate Article III standing in order to intervene" in a challenge to a New Jersey statute).

4. The courts of appeals' continued divide over the question presented is not subject to dispute. The courts have recently, and repeatedly, acknowledged it. *See, e.g.*, Pet. App. 8a ("[A] circuit split on this issue has persisted for some time."); *King*, 767 F.3d at 245 ("[O]ur sister circuits are divided on th[e] question" whether "prospective *intervenors* must establish Article III standing."); *Metro. St. Louis Sewer Dist.*, 569 F.3d at 833 n.2 (describing "the circuit split regarding whether an intervenor must demonstrate standing"); *Dillard*, 495 F.3d at 1337 n.10 ("Other circuit courts have split in answering the question."). So too has the Solicitor General. *See* U.S. Br. in Opp. at 6, *Loyd* v. *Ala. Dep't of Corr.*, No. 99-248, 1999 WL 33640447 (Nov. 1999) (noting the "conflict in the circuits" but stating that the petition at hand did not squarely present it).

Nor is there any prospect that this division will resolve itself. Each court on the short side of the split has recently and sharply reasserted its position.

See Section 4 Deadline Litig., 704 F.3d at 976 (D.C. Cir. 2013) ("[t]he underlying rationale for th[e] [standing] requirement is clear" (citation omitted)); *City of Chi.*, 660 F.3d at 984-985 (7th Cir. 2011) (criticizing cases on the other side of the split and explaining what "[t]he cases that dispense with the [standing] requirement overlook"); *Metro. St. Louis Sewer Dist.*, 569 F.3d at 833 n.2 (8th Cir. 2009) (reviewing the split and concluding that there is "no reason" for the Eighth Circuit to revisit its position). And courts on both sides of the divide have grounded their respective rules in this Court's *Diamond* and *McConnell* decisions, making it unlikely that they will voluntarily change their positions. *Compare Ruiz*, 161 F.3d at 830 (noting that "some courts have interpreted language in *Diamond* to suggest that Article III may require intervenors to possess standing as a matter of constitutional law"), *with San Juan Cty.*, 503 F.3d at 1171-72 (drawing "support" for the contrary conclusion from the fact that the Court did not think it necessary to "specifically resolve" the question (citation omitted)), *and* Pet. App. 8a (saying that *McConnell* "suggested * * * that an intervenor need not independently have standing where the original party has standing"), *with United States* v. *Philip Morris USA Inc.*, 566 F.3d 1095, 1146 (D.C. Cir. 2009) (per curiam) (citing *McConnell* for the proposition that "one intervenor must have standing for us to consider their additional proposed remedy").

Because the conflict has persisted for decades without resolution, and the courts of appeals are in substantial disagreement over what this Court's prior cases referencing the issue might signal, this Court should grant the petition to finally resolve the

conflict and clarify whether Article III imposes any limit on who is entitled to intervene in federal cases.

II. THE DECISION BELOW IS WRONG.

The Court should also grant certiorari because the position adopted by the majority of circuits is wrong. Intervention gives an entity "equal standing with the original parties" and the authority to "litigate fully on the merits"—including such privileges as the right to seek discovery, demand a jury trial, request remedies, block settlements, receive attorney's fees, and (in some circumstances) raise new claims. Wright, *supra*, §§ 1920-1921; *see also City of Cleveland*, 17 F.3d at 1517; *Bethune Plaza*, 863 F.2d at 531. Each entity seeking to obtain these privileges at the *outset* of a suit must show that it has Article III standing. *See, e.g.*, *Fontenot* v. *McCraw*, 777 F.3d 741, 746 (5th Cir. 2015) ("The court must evaluate *each plaintiff's* Article III standing for each claim; 'standing is not dispensed in gross.'" (emphasis added) (quoting *Lewis* v. *Casey*, 518 U.S. 343, 358 n.6 (1996))). There is no reason why an entity should be exempt from this requirement merely because it waits until *after* a suit is filed to become a plaintiff. It comports with common sense that, "because an intervenor participates on equal footing with the original parties to a suit, a movant for leave to intervene under Rule 24(a)(2) must satisfy the same Article III standing requirements as original parties." *Bldg. & Constr. Trades Dep't* v. *Reich*, 40 F.3d 1275, 1282 (D.C. Cir. 1994).

This view of intervenor standing is consistent with this Court's prior statements on the requirements of Article III. The Court has said that "*any person* invoking the power of a federal court must demon-

strate standing to do so." *Hollingsworth*, 133 S. Ct. at 2661 (emphasis added). "Those who do not possess Art[icle] III standing may not litigate as suitors in the courts of the United States." *Valley Forge Christian Coll.* v. *Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 475-476 (1982). Because an intervenor is a "person invoking the power of a federal court," the intervenor "may not litigate as [a] suitor[] in the courts of the United States" without "Art[icle] III standing." *Hollingsworth*, 133 S. Ct. at 2661; *Valley Forge*, 454 U.S. at 475-476.

The contrary rule adopted by the majority of circuits should not be permitted to stand. That rule imposes significant costs on the legal system. It allows parties that have only an attenuated interest in a case—too attenuated, by definition, to support the constitutional minima of standing—to make costly demands concerning discovery, remedies, fees, and other matters. That is one reason why the Seventh Circuit requires intervenors to have standing: "because intervention can impose substantial costs on the parties and the judiciary, not only by making the litigation more cumbersome but also (and more important) by blocking settlement, the would-be intervenor will not be permitted." *Solid Waste Agency*, 101 F.3d at 507 (citation omitted). Without the "already wide boundaries of Article III standing" as a backstop, *id.*, "intervention would be too easy and clutter too many lawsuits with too many parties," *City of Chi.*, 660 F.3d at 985.

This case offers a vivid illustration of the costs imposed by the majority rule. According to Laroe, the current plaintiff, Ms. Sherman, has asserted that

she lacks an "incentive to move the case forward" and is "unwilling to pursue the takings claim" herself. Pet. App. 13a (citation omitted). Yet by permitting Laroe to intervene—despite its inability to identify a cognizable interest in the outcome of the suit—the court has prolonged a case that has already lasted for eight years. *Id.* at 12a. Laroe's presence has "ma[d]e it really a new case." *City of Chi.*, 660 F.3d at 985 (citations omitted). Laroe therefore should be required to demonstrate its Article III standing. *See id.*

III. THIS CASE PROVIDES THE IDEAL VEHICLE FOR THE COURT TO RESOLVE THIS IMPORTANT QUESTION.

1. The question presented is critically important because it concerns the proper reach of federal courts' Article III subject-matter jurisdiction in cases involving intervenors—cases numbering in the hundreds every year. The importance of the question is reflected in the fact that this Court has decided similar questions related to intervenor standing on multiple occasions in recent years. *See Wittman* v. *Personhuballah*, 136 S. Ct. 1732, 1737 (2016) (intervenors lacked standing to appeal); *Hollingsworth*, 133 S. Ct. at 2668 (same); *see generally Arizonans for Official English*, 520 U.S. at 66 (expressing "grave doubts whether [the intervenors] have standing under Article III to pursue appellate review").

The question presented also is a frequently recurring one. In the circuits where Article III standing is a prerequisite for intervention, an entity's ability to intervene is often decided on that ground. *See, e.g.*, *Agric. Retailers Ass'n* v. *U.S. Dep't of Labor*, No. 15-

1326, 2016 WL 5315200, at *4 (D.C. Cir. Sept. 23, 2016) ("We deny the motion because the Union has failed to establish its standing to intervene."); *In re Idaho Conservation League*, 811 F.3d 502, 513-514 (D.C. Cir. 2016) ("We conclude the proposed intervenors fall short of demonstrating their right to intervene because they fail to show they have Article III standing, which they do not dispute is required."); *Mo. Coal. for the Env't Found.* v. *Mccarthy*, No. 2:16-CV-04069-NKL, 2016 WL 3566253, at *4 (W.D. Mo. June 27, 2016) ("Accordingly, the Intervenors have not identified an imminent injury that grants them Article III standing in this lawsuit. Their request to intervene under Rule 24(a) is denied." (footnote omitted)); *Liddell* v. *Bd. of Educ. of City of St. Louis*, No. 4:72CV100 HEA, 2016 WL 3913762, at *2 (E.D. Mo. July 20, 2016) ("Based upon the foregoing analysis, the Court concludes that Movants lack standing to intervene in this matter, and therefore, the Motion will be denied."); *Forest Cty. Potawatomi Cmty.* v. *United States*, No. CV 15-105 (CKK), 2016 WL 1465324, at *4 (D.D.C. Apr. 14, 2016) ("The Menominee have standing under Article III to intervene in this case." (underlining removed)).

Even in those circuits that do not require standing, courts continue to address the issue. *See, e.g.*, *Timber View Props., Inc.* v. *M&T Prop. Invs. Ltd.*, No. 2:15-CV-2855, 2016 WL 4472771, at *2 (S.D. Ohio Aug. 25, 2016) ("even though Gemmell may not ultimately have standing, the standards for intervention are met in this case"); *Steward* v. *Abbott*, No. 5:10-CV-1025-OLG, 2016 WL 4771311, at *1 (W.D. Tex. May 17, 2016) ("To the extent that Texas's argument for dismissal goes to Article III standing, it fails because the United States, as an intervenor who

seeks no relief beyond that sought by the Plaintiffs in this case, need not possess Article III standing to proceed.").

And in the outlier courts of appeals that have not decided the issue (the First, Fourth, and Federal Circuits), the district courts have had to reach their own conclusions in light of the circuit divide. *See, e.g.*, *NAACP* v. *Duplin Cty.*, No. 7:88-CV-00005-FL, 2012 WL 360018, at *3 n.3 (E.D.N.C. Feb. 2, 2012) ("declin[ing] to impose the requirement that defendant intervenors must show Article III standing in order to intervene as a matter of right where the Fourth Circuit is silent on the issue"); *Brook Vill. N. Assocs.* v. *Jackson*, No. 06-CV-046-JD, 2006 WL 3308328, at *4 (D.N.H. Nov. 13, 2006) ("declin[ing] to permit [entities] to intervene absent a showing that they have standing" given that "[t]he circuits are split as to whether standing is required for intervention" and "the First Circuit has not decided the question"); *Wolfchild* v. *United States*, 77 Fed. Cl. 22, 28 n.12 (2007) (noting that "no reported decision of the Federal Circuit appears directly to address * * * whether an intervenor must satisfy the requirements of Fed. R. Civ. P. 24(a) *and* Article III," but requiring standing in an "analogous" circumstance).

Given the great importance of the issue as a doctrinal matter, and its frequently recurring nature, resolution of the question presented is of great practical importance to litigants. As the Litigation Section of the American Bar Association has recognized, "[w]ould-be intervenors continue to face differing standards for joining a lawsuit under Federal Rule of Civil Procedure 24" because "[f]ederal circuit courts remain divided over whether it is sufficient for

intervenors as of right to meet the 'interest' requirement of Rule 24(a) or whether they must also independently establish standing under Article III of the Constitution." Renee Choy Ohlendor, Am. Bar Ass'n, Litigation News, *Intervenors Still in Limbo on Standing Requirements* (Mar. 26, 2012), https://goo.gl/OxLocd. With the rule of intervention varying from court to court, "[t]he word to the wise is, for the moment, to know how your circuit treats this issue." And "[a]s to whether there will be a resolution of the circuit split any time soon, that's up to the Supreme Court." *Id.* (internal quotation marks omitted).

2. This case furnishes the right vehicle for the Court to finally resolve this issue. Since the circuit split emerged years ago, the Court has not been presented with a viable opportunity to decide the question. In *Diamond* and *McConnell*, the question was left unresolved because it was unnecessary to the resolution of the matter. *See McConnell*, 540 U.S. at 233 (declining to separately evaluate the intervenor's standing because its "position * * * is identical to the [defendant's]"); *Diamond*, 476 U.S. at 68 (declining to determine whether an intervenor generally must possess independent standing because the defendant in that case was no longer participating, so the intervenor had to "satisfy the requirements of Art[icle] III" "[t]o continue th[e] suit in the absence of [the defendant]").

Apart from these cases, the Court appears to have received seven petitions for certiorari that in some

way asked it to resolve this issue.[1] But each one suffered from a severe vehicle problem. In four petitions, the issue was irrelevant to the outcome of the case, either because the lower court's decision did not turn on which standard it applied or (as in *McConnell*) because the proposed intervenor raised no arguments not also raised by a named party. *See See* Br. in Opp. at 20, *King* v. *Governor of New Jersey*, No. 14-672, 2015 WL 546274 (Feb. 4, 2015); U.S. Br. in Opp. 5-6, *Elko Cty.* v. *Wilderness Soc'y*, No. 08-571, 2009 WL 390030 (Feb. 13, 2009); Br. in Opp. at 5, *Standing Together to Oppose Partial-Birth-Abortion* v. *Northland Family Planning Clinic, Inc.*, No. 07-291, 2007 WL 3322288 (Nov. 5, 2007); Br. in Opp. at 8-9, *Bradley* v. *First Gibraltar Bank, FSB*, No. 96-1276, 1997 WL 33561420 (Apr. 14, 1997). Two petitions described a narrow and unusual application of the split or were filed before the split concretely emerged. *See* Cert. Pet. at 17, *Cotter* v. *Mass. Ass'n of Minority Law Enf't Officers*, No. 00-563, 2000 WL 34000644 (Oct. 10, 2000); Cert. Pet. at 9, *Nw. Forest Res. Council* v. *Portland Audubon*

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[1] *See* Cert. Pet. at 34, *King* v. *Governor of New Jersey*, No. 14-672, 2014 WL 6847205 (Apr. 14, 1997); Cert. Pet. at 9, *Elko Cty.* v. *Wilderness Soc'y*, No. 96-1276, 2008 WL 4757428 (Oct. 28, 2008); Cert. Pet. at 11, *Standing Together to Oppose Partial-Birth-Abortion* v. *Northland Family Planning Clinic, Inc.*, No. 07-291, 2007 WL 2491376 (Aug. 30, 2007); Cert. Pet. at 17, *Cotter* v. *Mass. Ass'n of Minority Law Enf't Officers*, No. 00-563, 2000 WL 34000644 (Oct. 10, 2000); Cert. Pet. at 5-11, *Loyd, supra*, No. 99-248, 1999 WL 33640442 (July 6, 1999); Cert. Pet. at 10, *Bradley* v. *First Gibraltar Bank, FSB*, No. 96-1276, 1997 WL 33557429 (Feb. 7, 1997); Cert. Pet. at 9, *Nw. Forest Res. Council* v. *Portland Audubon Soc'y*, No. 88-1751, 1989 WL 1174212 (Apr. 22, 1989).

Soc'y, No. 88-1751, 1989 WL 1174212 (Apr. 22, 1989). One petition did not involve a Rule 24 motion to intervene at all. U.S. Br. in Opp. at 6-7, *Loyd*, *supra* (No. 99-248)

This case suffers from none of these defects. Laroe filed a motion "to intervene as a matter of right pursuant to Rule 24(a)(2)." Pet. App. 53a. The district court denied the motion because it held that Laroe "does not have standing" as a contract vendee of the property at issue to assert a takings claim. *Id.* at 57a; *see U.S. Olympic Comm.*, 737 F.2d at 268 ("Only the owner of an interest in property at the time of the alleged taking has standing to assert that a taking has occurred."). The Second Circuit then vacated the order and remanded the case for one reason: "Because we do not require proposed intervenors in this circumstance to show that they independently have standing." Pet. App. 2a. That ruling was dispositive of the appeal. *Id.* at 19a. This case thus cleanly presents the sole issue whether standing is a prerequisite for intervention as of right under Rule 24(a).

In sum, this case presents the right vehicle for the Court to resolve the circuits' acknowledged, intractable, and increasingly consequential dispute over whether standing is required to intervene as of right under Rule 24(a). The Court should grant the petition, hold that intervenors must possess Article III standing, and vacate the decision below and remand the case for further proceedings.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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NOVEMBER 2016

APPENDICES

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 15-1086-cv

LAROE ESTATES, INC.,

Movant-Appellant,

v.

TOWN OF CHESTER,

Defendant-Appellee.*

Appeal from the United States District Court
for the Southern District of New York
No. 12 Civ. 647 (Ramos, D.J.)

Argued January 27, 2016
Decided July 6, 2016

Before: CALABRESI, LYNCH, and LOHIER,
Circuit Judges.

LOHIER, *Circuit Judge*:

In this appeal we consider whether a proposed intervenor must demonstrate that it has standing

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* The Clerk of the Court is directed to amend the caption of this case as set forth above.

even when there is a genuine case or controversy between the existing parties that satisfies the requirements of Article III of the Constitution. The answer is no.

Steven Sherman, a now-deceased land developer, previously sued the Town of Chester (the "Town") alleging a regulatory taking. That litigation remains pending in the United States District Court for the Southern District of New York (Ramos, J.). Laroe Estates, Inc. ("Laroe"), a real estate development company, claimed that it, not Sherman, currently owns the property that is the subject of Sherman's dispute and sought to intervene pursuant to Rule 24 of the Federal Rules of Civil Procedure. Rather than determine whether Laroe satisfied the requirements of Rule 24, the District Court denied Laroe's motion on the ground that Laroe lacked standing to assert a takings claim against the Town. Because we do not require proposed intervenors in this circumstance to show that they independently have standing, we **VACATE** the order and **REMAND** to the District Court to determine in the first instance whether Laroe met the requirements of Rule 24.

BACKGROUND

This is the second time that this Court has considered a dispute related to the abandoned MareBrook development project in the Town of Chester. When we last did so, the District Court had dismissed Sherman's regulatory takings claim against the Town because it was unripe. Sherman v. Town of Chester, No. 12 Civ. 647 (ER), 2013 WL 1148922, at *9 (S.D.N.Y. Mar. 20, 2013). We reversed that decision, holding that the claim could proceed even though the Town never "rendered a

final decision on the matter." Sherman v. Town of Chester, 752 F.3d 554, 561 (2d Cir. 2014) (quotation marks omitted). That conclusion was based on the extraordinary facts of Sherman's case—facts that are fully recounted in our previous decision, with which we assume familiarity. We remanded the case back to the District Court to consider Sherman's takings claim on the merits. Id. at 569.

Shortly thereafter, Laroe filed a motion to intervene, purporting to be the equitable owner of the property at issue in Sherman's dispute. Laroe claims that it entered into a purchase agreement with Sherman in June 2003 (the "2003 Agreement"), pursuant to which Sherman agreed to sell Laroe three parcels of land within the proposed MareBrook subdivision. In exchange, Laroe agreed that it would pay $60,000 for each lot approved for development within the three parcels once Sherman's plans were approved by the Town. The agreement also required Laroe to make $6 million in interim payments while Sherman sought the Town's approval. The interim payments were secured by a mortgage that Sherman provided to Laroe "encumbering all of the Development Property." Joint App'x 192. If Sherman failed to obtain the Town's approval of a sufficient number of lots, Laroe retained the right to terminate the agreement. Over the next year, Laroe advanced Sherman more than $2.5 million for the project.

Although Sherman's efforts to secure the Town's approval stretched on, Laroe did not terminate the agreement. But in April 2013 TD Bank, which held a superior mortgage interest in the property, commenced a foreclosure proceeding. Hoping to

salvage the deal in view of the foreclosure, Laroe and Sherman signed a new contract (the "2013 Agreement") amending their earlier purchase agreement. The 2013 Agreement provided that the $2.5 million Laroe had already advanced Sherman, plus any amount paid to settle Sherman's obligation to TD Bank, would constitute the purchase price of the property. Once the Town approved the development, Laroe was required to transfer a certain number of lots back to Sherman depending on how many were approved by the Town. Subject to this requirement, the parties deemed the purchase price for the property "paid in full." Joint App'x at 234. To resolve TD Bank's foreclosure proceeding, the 2013 Agreement also granted Laroe the sole discretion to settle the debt owed to TD Bank and alternatively permitted Laroe to terminate the Agreement if Laroe and TD Bank failed to reach a settlement before the foreclosure sale. Laroe ultimately failed to satisfy Sherman's obligations to TD Bank. On May 21, 2014, a foreclosure sale occurred, and TD Bank took possession of the property. Laroe nevertheless chose not to terminate the agreement.

Throughout this period, Sherman (and subsequently his estate) continued litigating his takings claim. After we remanded the case, Laroe sought to intervene. By order dated March 31, 2015, the District Court denied the motion, concluding that Laroe's claim against the Town was futile. Sherman v. Town of Chester, No. 12 Civ. 647 (ER), 2015 WL 1473430, at *15–16 (S.D.N.Y. Mar. 31, 2015). Although the District Court acknowledged that "legal futility is not mentioned in Rule 24," it reasoned that

futility was nonetheless "a proper basis for denying a motion to intervene." Id. at *15 (citing In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig., Nos. 02 MDL 1484 (JFK), 02 Civ. 8472 (JFK), 2008 WL 2594819, at *5 (S.D.N.Y. June 26, 2008)). Relying on our decision in U.S. Olympic Committee v. Intelicense Corporation., S.A., 737 F.2d 263 (2d Cir. 1984), the District Court concluded that Laroe lacked standing to assert a takings claim because it was not "the owner of an interest in property at the time of the alleged taking." Sherman, 2015 WL 1473430, at *15 (quoting U.S. Olympic Comm., 737 F.2d at 268).

Having concluded that Laroe lacked standing, the District Court did not discuss at length whether Laroe otherwise satisfied the requirements of Rule 24, other than to suggest in a footnote that "it [was] not clear that [Laroe] satisfie[d] Rule 24's timeliness requirement," since Laroe waited to file its motion until after this Court reversed the District Court's decision dismissing Sherman's takings claim. Id. at *16 n. 20. But because the District Court concluded Laroe lacked standing, it declined to determine whether the motion was timely. Id.

This appeal followed.

DISCUSSION

1. Article III Standing

Laroe filed a motion for intervention as a matter of right under Rule 24(a)(2) or, in the alternative, permissive intervention under Rule 24(b). We review a district court's denial of a motion to intervene for abuse of discretion. Floyd v. City of New York, 770 F.3d 1051, 1057 (2d Cir. 2014). A district court abuses its discretion when "its decision

rests on an error of law (such as application of the wrong legal principle) or a clearly erroneous factual finding." MasterCard Int'l Inc. v. Visa Int'l Serv. Ass'n, 471 F.3d 377, 385 (2d Cir. 2006). Here, the District Court denied the motion as futile because, it held, a party seeking to intervene as of right must independently have standing, and Laroe, it concluded, separately lacked standing to assert a takings claim against the Town. See Sherman, 2015 WL 1473430, at *16. Although, as the District Court acknowledged, "legal futility is not mentioned in Rule 24," id. at *15, we have affirmed denials of a motion to intervene on that basis, United States v. Glens Falls Newspapers, Inc., 160 F.3d 853, 856 (2d Cir. 1998) (affirming the denial of a newspaper's motion to intervene to ask the district court to vacate a consent order sealing draft settlement documents). But we have not held that a party seeking to intervene as of right must independently have standing.

In fact, we suggested somewhat to the contrary in United States Postal Service v. Brennan, where a union of postal service employees sought to intervene in a dispute between the U.S. Postal Service and the owners of a small mail-delivery business in Rochester. 579 F.2d 188, 190 (2d Cir. 1978). The district court denied the union's motion partly because the union lacked standing. Although we ultimately affirmed that decision on other grounds, id. at 191, we explained that the motion should not have been denied for lack of standing, because "[t]he question of standing in the federal courts is to be considered in the framework of Article III[,] which restricts judicial power to 'cases' and 'controversies,'"

id. at 190 (quotation marks omitted). Therefore, we reasoned, "there [is] no need to impose the standing requirement upon [a] proposed intervenor" where "[t]he existence of a case or controversy [has] been established" in the underlying litigation. Id. Our approach accords with that of the majority (but not all) of our sister circuits that have addressed this issue.[1] See, e.g., King v. Governor of the State of New Jersey, 767 F.3d 216, 245–46 (3d Cir. 2014); Perry v. Schwarzenegger, 630 F.3d 898, 905–06 (9th Cir. 2011); City of Herriman v. Bell, 590 F.3d 1176, 1183–1184 (10th Cir. 2010); Dillard v. Chilton Cty. Comm'n, 495 F.3d 1324, 1336–37 & n. 10 (11th Cir. 2007); United States v. Tennessee, 260 F.3d 587, 595 (6th Cir. 2001); Ruiz v. Estelle, 161 F.3d 814, 829–30 (5th Cir. 1998). But see, e.g., City of Chicago v. Fed. Emergency Mgmt. Agency, 660 F.3d 980, 984–85 (7th Cir. 2011) (treating Article III standing as an

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[1] Some commentary mistakenly suggests that the Second Circuit is one of the minority of jurisdictions that require intervenors to demonstrate that they independently have standing, relying on our decision in In re Holocaust Victim Assets Litigation, 225 F.3d 191 (2d Cir. 2000), cited in 6 Moore's Federal Practice § 24.03. In that case, we dismissed the appeal of an intervening nonprofit organization because it lacked standing. Id. at 196-97. But we based that decision on the prudential (rather than constitutional) ground that it failed to show that it had "organizational standing." Id. at 195–97; see also Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 343 (1977). Although we acknowledged that six of the nonprofit's members ostensibly had standing to sue in their own right, we ultimately affirmed the District Court's denial of their motion to intervene because they did not otherwise satisfy the requirements of Rule 24. Holocaust Victim Assets Litig., 225 F.3d at 197-202. Holocaust Victim Assets Litigation therefore does not abrogate our position in Brennan that a proposed intervenor need not independently have standing.

additional requirement for intervenors); United States v. Metro. St. Louis Sewer Dist., 569 F.3d 829, 833–34 & n. 2 (8th Cir. 2009) (same); United States v. Philip Morris USA Inc., 566 F.3d 1095, 1145–46 (D.C. Cir. 2009) (same).

Although a circuit split on this issue has persisted for some time, the Supreme Court has expressly declined to resolve it. See Diamond v. Charles, 476 U.S. 54, 68–69 (1986). Instead, in Diamond v. Charles, it ruled only that when the original party in the litigation on whose side intervention occurred refuses to appeal and an intervenor wishes to appeal on its own, the intervenor must show that it satisfies Article III's standing requirement in the absence of the original party. Id. at 68. But since Diamond, the Supreme Court has certainly suggested—although without deciding—that an intervenor need not independently have standing where the original party has standing. In McConnell v. Federal Election Commission, for example, the Court determined that it "need not address the standing of the intervenor-defendants" because it was "clear . . . that the [named defendant,] . . . whose position . . . [was] identical to the [intervenor-defendants',]" had standing. 540 U.S. 93, 233 (2003), overruled on other grounds by Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010). So it is fair to say that while the Supreme Court has not explicitly endorsed our approach, it has sub silentio permitted parties to intervene in cases that satisfy the "case or controversy" requirement without determining whether those parties independently have standing. The District Court therefore erred by denying

Laroe's motion to intervene based on its failure to show it had Article III standing.

2. Failure to State a Claim

The Town argues in the alternative that we should affirm the District Court's order because Laroe's motion also fails to state a claim against the Town—whether or not Laroe has standing. Oral Arg. Tr. 27. That argument, however, is foreclosed by Trbovich v. United Mine Workers of America, 404 U.S. 528 (1972). In that case, a union member sought to intervene in a suit by the Secretary of Labor seeking to set aside the results of a union election. Id. at 529–30. Although, under the relevant statute, only the Secretary was authorized to bring such a claim, the union member was permitted to participate on the Secretary's side of the case, as long as he did not assert any new grounds for relief. Id. at 537, 539. Thus, under Trbovich, a party need not have a stand-alone claim of its own to intervene on the plaintiff's side of a case—at least as long as it asserts the same legal theories and seeks the same relief as the existing plaintiff.

That principle applies here. Although it is unclear from the record whether Laroe believes the Town is directly liable to Sherman or Laroe for the alleged taking, Laroe has acknowledged that its damages are essentially the same as Sherman's. Oral Arg. Tr. 16. And the Town does not dispute that the land that Laroe now claims it owns is part of the same parcel of land at issue in Sherman's takings litigation. Even if Laroe has no independent claim that could survive a motion to dismiss under Rule 12(b)(6)—an issue we need not decide—that does not bar it from continuing to participate in the litigation of

Sherman's takings claim, so long as it seeks relief that does not differ substantially from that sought by Sherman. Because neither a proposed intervenor's lack of Article III standing nor its failure to state an independent claim necessarily renders a motion to intervene futile, the District Court should have instead focused its analysis on the requirements of Rule 24, to which we now turn.

3. Rule 24

Laroe filed a motion for both intervention as a matter of right and permissive intervention. Convincing us to reverse the denial of a motion for permissive intervention is notoriously difficult. See United States v. Pitney Bowes, Inc., 25 F.3d 66, 73 (2d Cir. 1994). Here, though, we need not address Laroe's motion for permissive intervention because Laroe relies on the same "reasons supporting [its] request to intervene as [of] right." Appellant's Br. 34. We therefore focus on only Laroe's motion to intervene as of right.

The district court must grant an applicant's motion to intervene under Rule 24(a)(2) if "(1) the motion is timely; (2) the applicant asserts an interest relating to the property or transaction that is the subject of the action; (3) the applicant is so situated that without intervention, disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; and (4) the applicant's interest is not adequately represented by the other parties." MasterCard, 471 F.3d at 389; see also Fed. R. Civ. P. 24(a)(2). The Town of Chester argues that Laroe fails this test because its application was untimely, it lacks a separate interest in the proceeding, and any interest it has in the

litigation is adequately represented by Sherman's estate. Because the factual record before us is insufficiently developed at this stage to allow us confidently to resolve these arguments, we vacate the order and remand to the District Court to determine in the first instance if Laroe satisfies the requirements of Rule 24.

A. Timeliness

In determining whether a motion to intervene is timely, courts consider "(1) how long the applicant had notice of the interest before it made the motion to intervene; (2) prejudice to existing parties resulting from any delay; (3) prejudice to the applicant if the motion is denied; and (4) any unusual circumstances militating for or against a finding of timeliness." Pitney Bowes, 25 F.3d at 70.

The Town contends that Laroe waited too long to file its motion to intervene. Laroe responds that it first learned of this litigation after the Town filed its motion to dismiss in May 2012. Although Laroe waited until May 2014 to inform the District Court that it wished to intervene, it explains that it could not have filed its motion earlier because the District Court had by then dismissed Sherman's suit and it could have intervened only after we decided Sherman's appeal in 2014.

Laroe's explanation fails to answer why it did not try to intervene before the District Court first dismissed Sherman's takings claim. But even assuming that Laroe could have moved to intervene sooner, the litigation is still at an early stage. After we remanded the case, the Town filed a motion to dismiss several other claims from Sherman's complaint that we did not address in our previous

opinion. A motion for reconsideration is now pending before the District Court. So despite eight years having passed since Sherman first filed suit in federal court (and more than sixteen years since Sherman first applied for subdivision approval), the parties have not even begun discovery. Although we recognize that "the point to which the suit has progressed" is only "one factor in the determination of timeliness," NAACP v. New York, 413 U.S. 345, 365-66 (1973), this case does not represent an attempt by an intervenor to join a lawsuit at the eleventh hour.

Nor are we persuaded that Laroe's delay in filing the motion prejudiced the Town. The Town points to two ways in which it may have suffered prejudice. First, it asserts, Laroe's intervention would create "[t]he possibility of . . . a much more difficult settlement position." Oral Arg. Tr. 29. Second, it claims that because Laroe's contract with Sherman was essentially only a mortgage agreement, other creditors may attempt to join the litigation if Laroe is permitted to intervene.[2] While both arguments may explain how the Town is prejudiced by Laroe's participation in the litigation, neither shows how it would be prejudiced by Laroe's delay in filing its motion to intervene—our only concern on timeliness

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[2] The latter argument assumes that Sherman's other creditors are similarly situated to Laroe—in other words, that they agreed to purchase property from Sherman, prepaid a substantial sum of money, and signed a second agreement with Sherman that deemed the purchase price paid in full. There is nothing in the record before us to suggest that any other creditor is in the same situation as Laroe, let alone so many creditors that Laroe's intervention would open "the floodgates" as the Town fears. Oral Arg. Tr. 22.

under Rule 24. Indeed, at oral argument the Town wisely conceded that timeliness was not "necessarily where the prejudice would come in[,] in this case." Oral Arg. Tr. 30.

Laroe, on the other hand, claims it would be prejudiced by the denial of its motion to intervene. It invested a significant sum of money into the project and lost that investment allegedly due to the Town's onerous regulatory process. Sherman's estate does not oppose Laroe's intervention. But Laroe informed the District Court that Sherman's widow, the executrix of his estate, was unwilling to pursue the takings claim unless Laroe gave her an "incentive to move the case forward." Laroe's Letter to the District Court, May 28, 2014, ECF No. 16. And on appeal Laroe represents that Sherman's estate is "without funds" and therefore unable or unwilling to pursue the claim. Oral Arg. Tr. 10. Sherman's death, the alleged refusal of his impecunious estate to pursue the takings claim, and the subsequent sale of the foreclosed property might well prejudice Laroe and in any event constitute "unusual circumstances militating for . . . a finding of timeliness." MasterCard, 471 F.3d at 390. The District Court did not address this issue, and on remand it should have the opportunity to do so.

B. An Interest Relating to the Property

Rule 24 next requires the movant to "assert[] an interest relating to the property or transaction that is the subject of the action." Id. at 389. That interest must be "direct, substantial, and legally protectable." Wash. Elec. Coop., Inc. v. Mass. Mun. Wholesale Elec. Co., 922 F.2d 92, 97 (2d Cir. 1990). And when the underlying dispute involves a takings claim, the

movant must show that the interest existed at the time the alleged taking occurred.

The parties dispute whether Laroe is an "equitable owner" of the property referenced in the 2003 Agreement under New York law. Each side marshals what appear to be non-frivolous arguments in its favor.[3] See Appellant's Br. 11–13, 22–24 (citing, e.g., Matter of City of New York, 306 N.Y. 278, 282 (1954); Bean v. Walker, 464 N.Y.S.2d 895, 897 (4th Dep't 1983) ("[N]otwithstanding the words of the contract and implications which may arise therefrom, the law of property declares that, upon the execution of a contract for sale of land, the vendee acquires

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[3] Although the Town characterizes the 2003 Agreement as only a "mortgage agreement," Appellee's Br. 17, it appears on its face to be an agreement for the purchase of property. For example, it refers to Sherman as the "Seller" and Laroe as the "Purchaser," and it states that "Seller agrees to sell and convey to Purchaser" certain lots from the proposed subdivision. It is true that Sherman provided a mortgage as security for the $2.5 million Laroe paid him, but structuring the transaction in that way does not necessarily convert the purchase agreement into a loan. At the end of the day, Laroe did not want to be paid back—it wanted the property.

In 2013 Sherman and Laroe agreed that the more than $2.5 million Laroe had already paid Sherman would constitute the purchase price for the property, along with any money Laroe paid to settle Sherman's debts under the TD Bank mortgages. The Town asserts that this additional requirement demonstrates that Laroe did not have a vested interest in the property: it never settled the TD Bank mortgages, so it never held an interest in the land. We disagree. The 2013 Agreement vested Laroe with "the sole discretion" to settle the TD Bank mortgages. Joint App'x at 234. So long as Laroe transferred the required number of lots back to Sherman after the Town approved the subdivision, the 2013 amendment deemed the purchase price "paid in full." Id.

equitable title.")); Appellee's Br. 23–25 (citing Yale Auto Parts, Inc. v. Johnson, 758 F.2d 54, 58 (2d Cir. 1985) ("[T]o have a 'property' interest entitled to Fourteenth Amendment procedural protection[,] a person . . . must have more than a unilateral expectation of it.") (quotation marks omitted)). The record certainly suggests that Sherman intended to sell at least a portion of the proposed development to Laroe. But the Town responds that even if Laroe was the equitable owner, it lacked a "vested property interest" at the time of the alleged taking. Appellee's Br. 24–25. Indeed, one way of thinking about the Town's misguided argument about standing is that it is essentially a challenge to the "interest" requirement of Rule 24(a)(2).[4] But trying to identify the precise nature of Laroe's interest in the property is difficult at this stage of the litigation, when the factual record has not been fully developed. For example, the 2003 Agreement provided for the sale of certain lots within the proposed MareBrook subdivision, but Laroe now claims to be the owner of the entire property. Nor can we conclude, based on the record before us, that Laroe had an interest in the property when the alleged taking occurred because, as Laroe acknowledged at oral argument, the District Court has yet to determine when the Town's conduct allegedly became so onerous that it rose to the level of a taking.

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[4] In particular, both parties frame this appeal as raising a question of standing premised on New York law: whether the "equitable owner" of real property has standing to assert a regulatory takings claim against the town in which the property is located.

None of these uncertainties mean that the Rule 24 motion should have been denied. "Rule 24(a)(2) requires not a property interest but, rather, 'an interest relating to the property or transaction which is the subject of the action.'" Brennan v. N.Y.C. Bd. of Educ., 260 F.3d 123, 130 (2d Cir. 2001) (emphasis added). "An interest that is otherwise sufficient under Rule 24(a)(2) does not become insufficient because the court deems the claim to be legally or factually weak." Id. Here, Laroe's position appears sufficiently tied to Sherman's that the District Court should have considered whether it satisfied the requirements of Rule 24. To be clear, we do not mean to definitively state whether, under New York law, Laroe has a vested interest in the property that would permit it to bring a takings claim against the Town in a separate action. That is not what Rule 24 requires. Instead it asks only whether the proposed intervenor has an "interest in the proceeding" that is "direct, substantial, and legally protectable." Wash. Elec. Coop., 922 F.2d at 97. An interest fails to meet the first two requirements (which are not genuinely disputed by the parties) if it is "remote from the subject matter of the proceeding, or . . . contingent upon the occurrence of a sequence of events." Id. In Washington Electric Cooperative, Inc. v. Massachusetts Municipal Wholesale Electric Co., for example, we held that a state regulatory agency's interest in litigation between two electric companies was not sufficient because it was "based upon a double contingency." Id. The regulatory agency hoped to collect on behalf of ratepayers a portion of any judgment the plaintiff electric company obtained from the defendant. Id. at 95. But in order for the agency to succeed, the plaintiff was first required to

win a judgment against the defendant, and then the agency would have had to convince the Vermont Public Service Board, a nonparty to the dispute, to decide that the ratepayers were entitled to a percentage of the plaintiff's recovery. Id. at 97. "Such an interest," we explained, "cannot be described as direct or substantial." Id.

As to the third requirement that the interest be legally protectable, Laroe appears to have paid in full for the property, and it could have closed on the sale were it not for the alleged regulatory taking at issue in the underlying dispute. Were the District Court to conclude that the Town did in fact commit a regulatory taking, it seems to us that it could potentially provide relief that benefits Laroe. Thus, whether or not Laroe actually holds a form of title to the property, it has made at least a colorable claim at this stage in the litigation that it has an interest relating to the property that is "legally protectable." Id. Of course, additional facts may shed light on the precise nature of this interest. We therefore find it prudent to remand for the District Court to determine in the first instance whether Laroe satisfies the interest requirement of Rule 24, separate and apart from the question of whether it would have standing in its own right. In so doing, it would be important, in our view, for the District Court to express its judgment on whether under New York law Laroe has a "direct, substantial, and legally protectable" interest relating to the property. Id.

C. Remaining Requirements

Rule 24(a)(2) also requires the movant to show that it "is so situated that without intervention, disposition of the action may, as a practical matter,

impair or impede [its] ability to protect its interest," and that its "interest is not adequately represented by the other parties." MasterCard, 471 F.3d at 389. As we have observed, Laroe's ability to protect its interest appears likely to be impaired by a judgment on Sherman's takings claim, since Laroe purports to be the equitable owner of that property. But again, the underdeveloped factual record on appeal makes it difficult for us to determine whether Sherman will adequately represent Laroe's interest—a question the District Court did not address at all. "[T]he burden to demonstrate inadequacy of representation is generally speaking 'minimal,'" Butler, Fitzgerald & Potter v. Sequa Corp., 250 F.3d 171, 179 (2d Cir. 2001) (quoting Trbovich, 404 U.S. at 538 n. 10), and Laroe has represented that Sherman's estate is "without funds" and thus unwilling or unable to pursue the takings claim, Oral Arg. Tr. 10. Still, this assertion conflicts with the estate's continued effort to oppose the Town's second motion to dismiss, which was filed after we remanded Sherman's takings claim back to the District Court. Laroe also admitted that Sherman's estate shared a unity of interest with Laroe with respect to the Town's liability for the alleged taking, though Laroe argued that they may disagree about litigation strategy and on the issue of damages were they to prevail. Oral Arg. Tr. 11. We leave it to the District Court to determine whether, among other things, ending the litigation one way or the other would impair Laroe's ability to protect its interests, and whether Sherman's estate adequately represents those interests.

CONCLUSION

For the foregoing reasons, we vacate the District Court's order of March 31, 2015, insofar as it denied Laroe's motion to intervene, and we remand for further proceedings consistent with this opinion.

APPENDIX B

IN THE
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

OPINION AND ORDER
12 Civ. 647 (ER)

NANCY J. SHERMAN,

Plaintiff,

v.

TOWN OF CHESTER,
TOWN BOARD OF THE TOWN OF CHESTER, and
PLANNING BOARD OF THE TOWN OF CHESTER,

Defendants.

RAMOS, D.J.:

This matter is once again before the Court on a motion to dismiss brought by the Defendants Town of Chester, New York ("the Town"), the Town Board of the Town of Chester, and the Planning Board of the Town of Chester.[1] (Doc. 21). Steven M.

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[1] This Opinion generally refers to "the Town" rather than "Defendants" because the Planning Board and the Town Board are not suable entities. *See, e.g., S.W. ex rel. J.W. v. Warren*, 528 F. Supp. 2d 282, 302-03 (S.D.N.Y. 2007). Plaintiff argues that he must include these arms of the Town because he has an Article 78 claim. *See* Pl.'s Mem. 27. However, Plaintiff can no longer prosecute his Article 78 claim in this action because it has been removed to federal court. *See, e.g., S&R Dev. Estates, LLC v. Bass*, 588 F. Supp. 2d 452, 464 (S.D.N.Y. 2008) ("An

Sherman,[2] a real estate developer, initially filed this suit on January 12, 2012, in the Supreme Court for Orange County, New York, generally alleging that for over the previous decade, the Town wrongfully obstructed his efforts to develop MareBrook, a 398 acre parcel of land he purchased in 2001 for $2.7 million. Compl. ¶¶ 5, 39, 353.[3] Specifically, Plaintiff claims that by implementing a series of amendments to the local zoning laws that specifically targeted his project, and otherwise engaging in conduct that frustrated his ability to even begin development, the Town violated his rights to freedom of religion, freedom to petition, substantive due process, procedural due process, equal protection, and his right not to have his property taken without just compensation under the federal and New York state constitutions.

Pending before the Court is the Town's renewed motion to dismiss following the Second Circuit's reversal of this Court's determination that Sherman's federal takings claim was unripe. The Town argues that all of Sherman's remaining claims, both federal and state, are time barred, and even if not, fail to state a claim for relief. For the reasons

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Article 78 proceeding must be brought in New York State court."). All claims against the Town Board and Planning Board are therefore dismissed.

[2] Mr. Sherman passed away in October 2013. His widow, Nancy J. Sherman has replaced him as the Plaintiff. For conformity with past decisions, this Court refers to refers to Plaintiff by using masculine pronouns.

[3] Defendants removed the action to this Court on January 26, 2012. Notice of Removal. (Doc. 1).

set forth below, Defendants' motion is GRANTED in part and DENIED in part.

Also before the Court is a motion to intervene brought by Laroe Estates, Inc. ("Laroe"), on the basis that as holder of "equitable title" to MareBrook, Laroe is the owner of the property and therefore has standing to intervene as of right, or at least permissively, under Federal Rule of Civil Procedure 24 (a) and (b), respectively. (Doc. 24). Laroe's motion is DENIED.

I. Background[4]

The background of this case is set forth in great detail in this Court's March 2013 Order, as well as the Second Circuit's decision in *Sherman v. Town of Chester*, 752 F.3d 554 (2014), familiarity with which is assumed. Thus, the Court will only state facts necessary for disposition of the instant motions.

As originally conceived, the MareBrook project was to include 385 residential housing units, a golf course, an equestrian facility, baseball fields, tennis courts, a clubhouse and an on-site restaurant. Compl. ¶ 10. By way of general background, Sherman claims that the Town wrongfully prevented him from developing MareBrook because it variously wanted: (1) to make MareBrook a "*de facto* nature preserve," *id.* at ¶¶ 21, 30, 285, 299; (2) to retaliate against him for instituting several lawsuits against the Town over the development of MareBrook, *id.* at ¶¶ 26-29, 61, 225, 231, 241, 262; and (3) to discriminate against

[4] The following facts are based on the allegations in the SAC, which the Court accepts as true for purposes of the instant motion. *See Koch v. Christie's Int'l PLC*, 699 F.3d 141, 145 (2d Cir. 2012).

him because he is Jewish, one of his business associates is Jewish, and Town residents are worried about MareBrook becoming a Hasidic community, *id.* ¶¶ 31-32, 222, 225, 307-24, 326. Plaintiff concludes that the Town's obstruction shows that a "[s]ecret 'final decision'" was made to block him from developing his property. *Id.* at ¶ 56.

The Town filed its first motion to dismiss on May 7, 2012. (Doc. 6). By Opinion and Order issued on March 20, 2013 (the "March 2013 Order") (Doc. 14), the Court granted the motion, finding that each of Sherman's federal constitutional claims were unripe pursuant to *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), and declining supplemental jurisdiction over Sherman's state claims. Sherman appealed.[5]

As relevant to this motion, Sherman first filed suit in federal court on May 5, 2008. *See Sherman v. Town of Chester et al.*, No. 08-civ-4248 (*"Sherman I"*); Compl. ¶ 218. In that lawsuit, as in the instant one, he alleged a federal takings claim. As the Second Circuit observed, Sherman voluntarily dismissed that action on January 6, 2012,[6] in response to the Town's argument that the takings claim was unripe because Sherman had not alleged that he sought and

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[5] Sherman also made facial and as-applied challenges to a Town law that requires developers to pay the Town's consultants' fees, arguing that it violated state law and Plaintiff's due process rights. In the March 2013 Order, the Court dismissed those claims, finding that Sherman was accorded sufficient procedure. March 2013 Order at 18-24. Sherman did not appeal that finding.

[6] *See* Compl. ¶ 218 fn.9.

was denied just compensation by an available state procedure. *Sherman*, 752 F.3d at 563-64. He then re-filed his federal takings claim and his state law claims for compensation in Supreme Court, Orange County, several days later on January 12, 2012. It was that subsequently filed lawsuit that the Town removed to this Court on January 26, 2012.

In *Sherman v. Town of Chester*, 752 F.3d 554 (2d Cir. 2014), the Second Circuit reversed this Court's determination that Sherman's federal takings claim was unripe. Applying the test stated in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), the Circuit Court found that Sherman had stated a non-categorical taking. *Sherman*, 752 F.3d at 566. In reaching that conclusion, the Circuit found that the Town's actions "effectively prevented Sherman from making any economic use of this property," interfered with his reasonable investment-backed expectations, and "singled out [his] development, suffocating him with red tape to make sure he could never succeed in developing MareBrook." *Id.* at 565. The Circuit Court then determined that the takings claim was not barred by the three year statute of limitations applicable to claims brought under 42 U.S.C. § 1983. Specifically, the Circuit Court rejected the Town's position that only actions taking place within three years of filing of the complaint should be considered:

> But that argument would mean that a government entity could engage in conduct that would constitute a taking when viewed in its entirety, so long as no taking occurred over any three-year period. We do not accept this. The Town used extreme delay to effect the

> taking. It would be perverse to allow the Town to use that same delay to escape liability.
>
> The only way plaintiffs in Sherman's position can vindicate the Supreme Court's admonition in *Palazzolo* [*v. Rhode Island*, 553 U.S. 606 (2001)], that government authorities 'may not burden property by imposition of repetitive or unfair land-use procedures' is to allow to them aggregate acts that are not individually actionable. *See* 533 U.S. at 621. A claim based on such a 'death by a thousand cuts' theory requires a court to consider the entirety of the government entity's conduct, not such a slice of it. [. . .] [B]ecause Sherman alleges that at least one of the acts comprising the taking occurred within three years of the filing of the case, his claim is not time barred.

Id. at 566-67.

While the Circuit Court did not subject Plaintiff's other constitutional claims—which allege First Amendment, Equal Protection and Due Process violations—to the same analysis, it held that to the extent they had been dismissed solely on ripeness grounds, this Court's ruling can no longer stand. *Id.* at 567. Accordingly, it remanded those claims for the purpose of determining whether Sherman has stated a claim. Finally, the Circuit Court vacated this Court's decision remanding the state law claims because of its determination that Sherman had plausibly stated at least one federal claim. *Id.* at 568.[7]

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[7] The Circuit Court affirmed this Court's decision dismissing (1) Plaintiff's procedural due process claims based on the

II. Discussion

A. 12(b)(6) Motion to Dismiss Standard

When ruling on a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the court must accept all factual allegations in the complaint as true and draw all reasonable inferences in the plaintiff's favor. *Nielsen v. Rabin*, 746 F.3d 58, 62 (2d Cir. 2014). The court is not required to credit "mere conclusory statements" or "threadbare recitals of the elements of a cause of action." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)); *see also id.* at 681 (citing *Twombly*, 550 U.S. at 551). "To survive a motion to dismiss, a complaint must contain sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'" *Id.* at 678 (quoting *Twombly*, 550 U.S. at 570). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). More specifically, the plaintiff must allege sufficient facts to show "more than a sheer possibility that a defendant has acted unlawfully." *Id.* If the plaintiff has not "nudged [his] claims across the line from conceivable to plausible, [the] complaint must be dismissed." *Twombly*, 550 U.S. at 570; *Iqbal*, 556 U.S. at 680.

The question in a Rule 12 motion to dismiss "'is not whether a plaintiff will ultimately prevail but

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Town's consultants' fee law and (2) 42 U.S.C. §1981 claims, and denying as futile Plaintiff's request to add a § 1982 claim. Sherman, 752 F.3d at 567.

whether the claimant is entitled to offer evidence to support the claims.'" *Sikhs for Justice v. Nath*, 893 F. Supp. 2d 598, 615 (S.D.N.Y. 2012) (quoting *Villager Pond, Inc. v. Town of Darien*, 56 F.3d 375, 278 (2d Cir.1995)). "[T]he purpose of Federal Rule of Civil Procedure 12(b)(6) 'is to test, in a streamlined fashion, the formal sufficiency of the plaintiff's statement of a claim for relief without resolving a contest regarding its substantive merits,'" and without regard for the weight of the evidence that might be offered in support of Plaintiffs' claims. *Halebian v. Berv*, 644 F.3d 122, 130 (2d Cir. 2011) (quoting *Global Network Commc'ns, Inc. v. City of New York*, 458 F.3d 150, 155 (2d Cir. 2006)).

B. Sherman's Federal Constitutional Claims

As a preliminary matter, the Court notes that Sherman overly relies on the Second Circuit's conclusion that his takings claim constitutes a continuing violation. He assumes that each of his federal constitutional claims are saved by the same analysis. He is mistaken. Under the continuing violation doctrine, "[w]here a plaintiff can demonstrate an ongoing or continuing violation of his federally protected rights, the plaintiff is entitled to bring suit challenging all conduct that was part of the violation, even conduct that occurred outside the limitations period." *Ruane v. Cnty. of Suffolk*, 923 F.Supp.2d 454, 459 (E.D.N.Y.2013) (internal quotation marks omitted). "[C]ourts of this circuit consistently have looked unfavorably on continuing violation arguments . . . and have applied the theory only under compelling circumstances." *Id.* (quoting *Blankman v. Cnty. of Nassau*, 819 F.Supp. 198, 207

(E.D.N.Y. 1993)). Where particular acts serve to put a plaintiff on notice of his claim, the continuous violation doctrine is inapplicable, even if there were subsequent acts constituting a violation. *See Kellogg v. N.Y. State Dep't of Corr. Servs.*, No. 07-CV-2804, 2009 WL 2058560, at *1 (S.D.N.Y. July 15, 2009) ("[T]he continuing-violation doctrine does not apply to discrete acts, but only to ongoing circumstances that combine to form a single violation that cannot be said to occur on any particular day."); *see also Libbey v. Vill. of Atl. Beach*, 982 F.Supp.2d 185, 212, No. 13-CV-2717, 2013 WL 5972540, at *20 (E.D.N.Y. Nov. 04, 2013) (no continuing violation even though allegations "span several years" where time-barred conduct was a discrete act occurring on a specific date).

Here, the Second Circuit found that the takings claim was continuing because the facts of this case involved "an unusual series of regulations and tactical maneuvers that constitute a taking when considered together, even though no single component is unconstitutional when considered in isolation." *Sherman*, 752 F.3d at 567. As a result, the Court concluded, it could not be said that Sherman's property was 'taken' on any particular day." *Id.* That determination does not compel the conclusion that each of his other federal constitutional claims are also continuing violations. Certainly, the Circuit Court did not suggest as much. The only finding of general application made by the Circuit Court was that because the takings claim was ripe, the balance of his constitutional claims were also ripe for the same reason. *Id.* The Circuit Court remanded for the limited purpose of

determining whether those allegations stated a claim. Therefore, each claim must be considered individually.

The parties agree that a three year statute of limitations applies to Sherman's federal constitutional claims. *See* Mem. L. Supp. Def.'s 2d. Mot. Dismiss ("Def.'s Mem.") (Doc. 23) at 17-18; Mem. L. Opp. Def.'s 2d. Mot. Dismiss ("Pl.'s Mem.") (Doc. 33) at 4; *see also Lynch v. Suffolk Cnty. Police Dep't, Inc.*, 348 F. App'x. 672, 674 (2d Cir. 2009) (summary order) (the statute of limitations for a § 1983 action arising in New York is three years). Under federal law, a claim arising under § 1983 "accrues" when the plaintiff "knows or has reason to know of the injury which is the basis of his action." *Pearl v. City of Long Beach*, 296 F.3d 76, 80 (2d Cir. 2002). Accordingly, the Town argues that because this action was filed on January 12, 2012, any cause of action that accrued before January 12, 2009, is barred. Sherman, however, argues that the limitations period should be measured by reference to the filing date of *Sherman I*—May 5, 2008—such that any claim that accrued on or after May 5, 2005, is timely. More broadly, Sherman argues that because the Second Circuit determined that his takings claim constituted a "continuous violation," *Sherman*, 752 F.3d at 566-67, the balance of his federal claims necessarily constitute continuous violations as well. According to Sherman, therefore, any act comprising a violation that occurred on or after May 5, 2005, is timely, even if the violation began earlier.

i. The Tolling Provision of Section 1367(d)[8]

Sherman argues that because he voluntarily dismissed his federal complaint in *Sherman I*, which included pendent state causes of action, the tolling provision of 18 U.S.C. § 1367(d) applies to his claims. Section 1367(d) of Title 28 expressly provides in relevant part:

> (a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties. [. . .]
>
> (c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—
>
> (1) the claim raises a novel or complex issue of State law,
>
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

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[8] The Circuit Court, having determined that Sherman's takings claim constituted a "continuous violation," declined to reach the issue of whether the limitations period is tolled under § 1367(d). *Sherman*, 752 F.3d at 567.

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after ***the dismissal*** **of the claim under subsection** ***(a)***, unless State law provides for a longer tolling period.

28 U.S.C. §1367 (emphasis added).

At first glance, the text of subsection (d), on its face, would appear to provide that *any* other claim that is dismissed at the same time as or after the dismissal of the pendent state claim *shall be tolled*. Fed. R. Civ. P. §1367(d). Upon closer reading, however, there is an ambiguity in the statute that has created substantial confusion concerning whether the tolling provision provided in subsection (d) applies *only* to those pendent claims dismissed pursuant to one of the four circumstances described in subsection (c), or whether it also applies to situations where the pendent claims were dismissed for any other reason, for example, as here, voluntarily pursuant to Fed. R. Civ. P. 41. *See*, 13D Wright, Miller, et al., *Federal Practice and Procedure* § 3567.4 (3d ed. 2008) ("Wright & Miller") (noting that the confusion is the result of "poor drafting").

In *Raygor v. Regents of Univ. of Minnesota*, 534 U.S. 533 (2002), the Supreme Court analyzed whether

§ 1367(d) applied to dismissals of claims not specifically listed in § 1367(c), acknowledging the lack of clarity in the statute. In that case the underlying dismissal was based on the defendant's Eleventh Amendment immunity. The Court determined that the tolling provision did not apply. The Court did so in part because Congress did not state clearly that the statute should apply to dismissals based on grounds other than those specifically enumerated in § 1367(c):

> The question then is whether § 1367(d) states a clear intent to toll the limitations period for claims against nonconsenting States that are dismissed on Eleventh Amendment grounds. Here the lack of clarity is apparent in two respects. With respect to the claims the tolling provision covers, one could read § 1367(d) to cover any claim "asserted" under subsection (a), but we have previously found similarly general language insufficient to satisfy clear statement requirements. For example, we have held that a statute providing civil remedies for violations committed by "'*any* recipient of Federal assistance'" was "not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment" even when it was undisputed that a state defendant was a recipient of federal aid. *Atascadero*, 473 U.S., at 245-246 [] (quoting 29 U.S.C. § 794a(a)(2) (1982 ed.) (emphasis in original)). Instead, we held that "[w]hen Congress chooses to subject the States to federal jurisdiction, it must do so specifically." 473 U.S., at 246 []. Likewise,

§ 1367(d) reflects no specific or unequivocal intent to toll the statute of limitations for claims asserted against nonconsenting States, especially considering that such claims do not fall within the proper scope of § 1367(a) as explained above.

With respect to the *dismissals* the tolling provision covers, one could read § 1367(d) in isolation to authorize tolling regardless of the reason for dismissal, but § 1367(d) occurs in the context of a statute that specifically contemplates only a few grounds for dismissal. The requirements of § 1367(a) make clear that a claim will be subject to dismissal if it fails to "form part of the same case or controversy" as a claim within the district court's original jurisdiction. Likewise, § 1367(b) entails that certain claims will be subject to dismissal if exercising jurisdiction over them would be "inconsistent" with 28 U.S.C. § 1332 (1994 ed. and Supp. V). Finally, § 1367(c) (1994 ed.) lists four specific situations in which a district court may decline to exercise supplemental jurisdiction over a particular claim. Given that particular context, it is unclear if the tolling provision was meant to apply to dismissals for reasons unmentioned by the statute, such as dismissals on Eleventh Amendment grounds. *See Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 [] (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme").

> In sum, although § 1367(d) may not clearly exclude tolling for claims against nonconsenting States dismissed on Eleventh Amendment grounds, we are looking for a clear statement of what the rule includes, not a clear statement of what it excludes. *See Gregory, supra*, at 467 []. Section 1367(d) fails this test. As such, we will not read § 1367(d) to apply to dismissals of claims against nonconsenting States dismissed on Eleventh Amendment grounds.

Id. at 544-46 (emphasis in original); *see also*, Wright & Miller § 3567.4 ("It seems that Congress intended [§1367(d)] to apply only to dismissals under §1367(c). Its inability to say so clearly creates confusion and wasteful litigation.")

Similarly, in one of only three cases identified by the parties or the Court concerning the application of § 1367(d) in the context of the voluntary dismissal, the district court for the Southern District of Ohio referenced the legislative history of the § 1367 and noted "§ 1367(d) 'provides a tolling of statutes of limitations for any *supplemental claim* that is dismissed *under this section* and for any other claims in the same action voluntarily dismissed at the same time or after the supplemental claim is dismissed.'" *Parris v. HBO & Co.*, 85 F. Supp.2d 792, 796 (S.D. Ohio 1999) (quoting H.R.Rep. No. 734, 101st Cong., 2d Sess. (1990), reprinted in 1990 U.S.C.C.A.N. 6860, 6876) (emphasis added). In accordance with that legislative history, the court reasoned that Congress did not intend the phrase "'the dismissal' to include dismissal of the supplemental state claim by *any* procedure but, rather, dismissal pursuant to §1367(c),

which provides four circumstances under which the district court may decline to exercise supplemental jurisdiction[.]" *Id.*[9] The Court therefore found that "for § 1367(d) to be applicable, the supplemental claim brought pursuant to § 1367(a) must have been dismissed by the court pursuant to § 1367(c)." *Id.* at 797. Because the "[p]laintiff 's state law claims were voluntarily dismissed pursuant to Fed. R. Civ. P. 41(a)(1) . . . and not pursuant to 28 U.S.C. § 1367(c)[,] the [p]laintiff cannot avail himself of 1367(d)." *Id.*

Based on the foregoing authority,[10] the Court finds that in order for Sherman to be entitled to the benefit of the tolling provision of § 1367(d), *Sherman I* must have been dismissed pursuant to § 1367(c). Because there is no dispute that *Sherman I* was voluntarily dismissed pursuant to Fed. R. Civ. P. 41(a)(1)(A)(i), a circumstance not contemplated by § 1367(c), Sherman's federal constitutional claims must have accrued on or after January 12, 2009.

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[9] The sole case identified by the Court that affirmatively found that voluntary dismissals are entitled to the benefit of §1367(d) tolling, also from the Southern District of Ohio, provides little analysis. *See Naragon v. Dayton Power & Light Co.*, 934 F. Supp. 899 (S.D. Ohio 1996). The third case, *Zychek v. Kimball International Marketing, Inc.*, 2006 WL 1075452 (April 21, 2006 D. Idaho), adopts the reasoning of *Parris*.

[10] Sherman cites no contrary case authority.

ii. The First Amendment Claim Time Bar[11]

At the outset, Plaintiff's First Amendment claims do not constitute a continuing violation because they are based on identifiable, discrete acts by the Town that were readily discerned by Sherman at the time the acts were taken. As the Circuit noted in *Deters v. City of Poughkeepsie*, 150 F. App'x 10, 12 (2d Cir. 2005), "[t]he Supreme Court recently clarified that the continuing-violations doctrine does not apply to discrete acts, but only to ongoing circumstances that combine to form a single violation that "cannot be said to occur on any particular day." (citation omitted). The *Deters* court concluded that "[t]he mere fact that the effects of retaliation are continuing does not make the retaliatory act a continuing one." Thus, in order to be timely, Sherman must plausibly allege a retaliatory act within the applicable limitations period, i.e., on or after January 12, 2009. *Id.* Here, Sherman plausibly alleges that after he filed his first federal complaint and later amended it in 2010,[12] "for many

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[11] This Court previously dismissed Sherman's First Amendment freedom of religion claim as frivolous, *see* March 2013 Order at 16; a determination that he did not challenge on appeal. The Circuit Court also noted that Sherman's allegations that the Town discriminated against him because he was Jewish were "insufficient." *Sherman*, 752 F.3d at 567. Accordingly, the only basis for Sherman's First Amendment claim is pursuant to the petition clause.

[12] The Court does not construe Sherman's subdivision application, nor his subsequent revised applications, to be "petitions" for First Amendment purposes. *Ridgeview Partners, LLC v. Entwhistle*, 227 Fed. App'x 80, 82 (2d Cir 2007) (site-plan application does not purport "to complain to public officials [or] to seek administrative [or] judicial relief from their actions").

months . . . during 2009, 2010, and 2011 . . . [t]he Planning Board . . . refused to allow him on its agenda, or appear otherwise." Compl. ¶ 383. Thus, his claim survives if it otherwise states a claim. Here, Sherman has stated a plausible First Amendment retaliation claim.

iii. First Amendment Retaliation Claim

To plead a First Amendment retaliation claim, a plaintiff must show: "(1) he has a right protected by the First Amendment; (2) the defendant's actions were motivated or substantially caused by his exercise of that right; and (3) the defendant's actions caused him some injury." *Dorsett v. Cnty. of Nassau*, 732 F.3d 157, 160 (2d Cir.2013). On a motion to dismiss, the court "must be satisfied that such a claim is supported by specific and detailed factual allegations, which are not stated in wholly conclusory terms." *Velez v. Levy*, 401 F.3d 75, 97 (2d Cir. 2005) (internal quotation marks omitted).

In the Second Circuit, the viability of a prima facie First Amendment retaliation claim depends on the factual circumstances giving rise to the claim. *Zherka v. Amicone*, 634 F.3d 642, 643 (2d Cir. 2011); *see also Williams v. Town of Greenburgh*, 535 F.3d 71, 76 (2d Cir. 2008) ("We have described the elements of a First Amendment retaliation claim in several ways, depending on the factual context.") (citations omitted). "Private citizens alleging retaliation for their criticism of public officials" are generally required to show that "they engaged in protected speech, persons acting under color of state law took adverse action against them in retaliation for that speech, and the retaliation resulted in 'actual chilling' of their exercise of their constitutional right to free

speech." *Zherka*, 634 F.3d at 643. To prove the "actual chilling" element, it is not enough for the plaintiff to show that she changed her behavior in some way; she "must show that the defendant intended to, and did, prevent or deter [her] from exercising [her] rights under the First Amendment." *Hafez v. City of Schenectady*, 894 F. Supp. 2d 207, 221 (N.D.N.Y. 2012), *aff'd*, No. 12 Civ. 1811 (JSR), 2013 WL 1876610 (2d Cir. 2013).

However, in other private citizen cases, various forms of concrete harm have been substituted for the "actual chilling" requirement. *Zherka*, 634 F.3d at 643, 645-46; *see also Puckett v. City of Glen Cove*, 631 F. Supp. 2d 226, 239 (E.D.N.Y. 2009) (chilling element is required only "in cases where a plaintiff states no harm independent of the chilling of his speech"); *Tomlins v. Vill. of Wappinger Falls Zoning Bd. of Appeals*, 812 F. Supp. 2d 357, 371 (S.D.N.Y. 2011) (deeming allegations of retaliatory denial of building permits and a denial of an unconditional variance sufficient concrete harms to substitute for chilling effects); *Hafez*, 894 F. Supp. 2d at 222 (citing *Gagliardi v. Village of Pawling*, 18 F.3d 188 (2d Cir. 1994)) (alleging harm in the form of municipal defendants' misapplication of zoning code in retaliation for plaintiffs' exercise of free speech right).

Where a plaintiff has sufficiently alleged a concrete harm, and in the absence of a subjective chilling requirement, Second Circuit courts have only required a showing (1) that the First Amendment protected the plaintiff's conduct, and (2) that "defendants' conduct was motivated by or substantially caused by [the plaintiff's] exercise of speech." *Hafez*, 894 F. Supp. 2d at 222 (citing

Gagliardi, 18 F.3d at 194) (citation omitted); see also *Tomlins*, 812 F. Supp. 2d at 371 n.11. In light of the Circuit Court's opinion that the Town "singled out Sherman's development, suffocating him with red tape" over the course of a decade to "make sure he could never succeed in developing MareBrook," *Sherman* 752 F.3 at 565, that showing would appear to be easily met here. *See Tomlins*, 812 F. Supp. 2d 357, 375 (noting that where there is evidence that the defendant engaged in an "ongoing course of adverse action" against the plaintiff, such action may serve as additional evidence of retaliatory intent); *see, e.g.*, *Economic Opportunity Commission*, 106 F. Supp.2d 433, 437 (E.D.N.Y. 2000) ("[A] plaintiff can also show retaliatory intent by establishing . . . an ongoing campaign of adverse action."); *Hous. Works, Inc. v. City of New York*, 72 F. Supp. 2d 402, 426 (S.D.N.Y. 1999) ("Evidence of a 'pattern of antagonism' or of prior retaliatory conduct may serve as circumstantial evidence of retaliation."); *cf. Gagliardi*, 18 F.3d at 195 (motive adequately alleged by evidence that Village repeatedly refused plaintiffs' requests to enforce zoning codes and ordinances over a nine-year period). Sherman has established the requisite nexus.

Accordingly, the Town's motion to dismiss the First Amendment retaliation claim is DENIED.

iv. Due Process Claims Time Bar

As with his First Amendment claims, Sherman's due process claims do not constitute a continuing violation because they too are based on discrete acts by the Town that were readily discerned by Sherman at the time the acts were taken. *Deters*, 150 F. App'x at 12; *Libbey v. Village of Atlantic Beach*, 982

F. Supp.2d 185, 212 (E.D.N.Y. 2013) ("where . . . [p]laintiffs can identify particular periods of time and circumstances . . . they have merely alleged isolated acts, which [p]laintiffs could have recognized as actionable at the time); *Pearl v. City of Long Beach*, 296 F.3d 76, 80 (2d Cir. 2002) (a claim arising under § 1983 "accrues" when the plaintiff "knows or has reason to know of the injury which is the basis of his action"). Because the cognizable acts that he relies on all took place prior to January 12, 2009, his due process claims are barred. *See Fair Housing in Huntington Comm. V. Town of Huntington*, 2010 WL 2730757 (E.D.N.Y. July 8, 2010) (finding no continuing violation where harms arose out of discrete decisions of the zoning board beyond the statutory period). However, even if the Court were to consider them on the merits, both the procedural and substantive due process claims would still fail.

v. Procedural Due Process Claim

In order to bring a claim for violation of the procedural due process rights guaranteed by the Fourteenth Amendment, a plaintiff must show "(1) that he possessed a protected liberty or property interest; and (2) that he was deprived of that interest without due process." *Rankel v. Town of Somers*, 999 F. Supp.2d 527, 545 (S.D.N.Y. 2014); *Rehman v. State Univ. of N.Y. at Stony Brook*, 596 F.Supp.2d 643, 656 (E.D.N.Y. 2009); *accord Nnebe v. Daus*, 644 F.3d 147, 158 (2d Cir. 2011). A party asserting a deprivation of due process must first establish a property interest within the meaning of the Constitution. In the context of a zoning dispute, the party must demonstrate that it had a valid property interest in a benefit protectable under the

Fourteenth Amendment at the time of the alleged deprivation. *See Zahra v. Town of Southold*, 48 F.3d 674, 680 (2d Cir. 1995).

To possess a federally protected property interest, a person must have a "legitimate claim of entitlement to it." *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972); *Zahra*, 48 F.3d at 680 (quoting *RRI Realty Corp. v. Incorporated Village of Southampton*, 870 F.2d 911, 915 (2d Cir.), *cert. denied*, 493 U.S. 893 (1989)), and *Yale Auto Parts, Inc. v. Johnson*, 758 F.2d 54, 58 (2d Cir. 1985)). Such a claim does not arise from the Constitution, but rather from an independent source such as state or local law. *See id.*; *Donato v. Plainview-Old Bethpage Cent. Sch. Dist.*, 96 F.3d 623, 629 (2d Cir. 1996); *G.I. Home Developing Corp. v. Weis*, No. 07-CV-4115 (DRH), 2009 WL 962696, at *5 (E.D.N.Y. Mar. 31, 2009). "An abstract need, desire or unilateral expectation is not enough." *Abramson v. Pataki*, 278 F.3d 93, 99 (2d Cir. 2002) (citing *Roth*, 408 U.S. at 577). In addition, as a matter of law, a party has "no assurance that the zoning regulations [will] remain unchanged." *Sag Harbor Port Assocs. v. Village of Sag Harbor*, 21 F. Supp.2d 179, 183 (E.D.N.Y.1998), *aff'd*, 182 F.3d 901 (2nd Cir. 1999). "The [strict entitlement] analysis focuses on the extent to which the deciding authority may exercise discretion in arriving at a decision, rather than on an estimate of the probability that the authority will make a specific decision." *Zahra*, 48 F.3d at 680 (collecting cases). "Even if in a particular case, objective observers would estimate that the probability of issuance was extremely high, the opportunity of the local agency to deny issuance

suffices to defeat the existence of a federally protected property interest." *RRI Realty*, 870 F.2d at 911.

It is beyond cavil that the Town here has vested the Town Planning Board with broad discretion to review subdivision applications. *See* New York Town Law § 276; *see also Masi Management, Inc. v. Town of Ogden*, 180 Misc.2d 881, 691 N.Y.S.2d 706 (N.Y. Sup., 1999), *aff'd*, 273 A.D.2d 837, 709 N.Y.S.2d 734, 2000 N.Y. Slip Op. 06153 (N.Y.A.D. 4 Dept. Jun 16, 2000) ("Town Law § 276 . . . [has] been held to confer wide enough discretion on town officials to preclude a claim of entitlement sufficient to create a property interest cognizable under the substantive due process doctrine.") (citing *Honess 52 Corp. v. Town of Fishkill*, 1 F.Supp.2d 294, 304 (S.D.N.Y.1998)). Sherman does not argue otherwise. Instead, Sherman assumes that the Second Circuit's decision is dispositive on his due process claim and further argues that the due process violations—both procedural and substantive—are established through the administrative delay and concomitant expenses he suffered. His arguments are unavailing.

As the Second Circuit has recently held, failure to institute an Article 78 proceeding to mandamus the Town to act on his application forecloses a procedural due process claim based on delay. *See Nenninger v. Village of Port Jefferson*, 509 F. App'x. 36, 39 fn.2 (2d Cir. 2013) ("To the extent Nenninger argues that a failure to rule on his application—complete or incomplete—denied him procedural due process, the claim fails in any event because Nenninger was free to bring an Article 78 mandamus proceeding in New York State court.") (citations omitted)). As the Town

notes, Sherman's reliance on *Kuck v. Danaher*, 600 F.3d 159 (2d Cir. 2010), is misplaced, as that case involved the issuance of a firearm under Connecticut law, and specifically noted that the outcome might have been different under New York law because of the discretion afforded by New York law to issue gun permits.

In addition, to the extent Sherman premises a due process violation on the expenses he incurred in preparing his plan, the claim must fail because such a claim is generally not recognized in New York. *See Cedarwood Land Planning v. Town of Schodack Through Schodack Planning Bd.*, 954 F.Supp. 513, 521 (N.D.N.Y. 1997) ("[i]t is well established that, as a general rule, expenses incurred prior to the commencement of the actual construction do not create a vested interest." (citing *McBride v. Town of Forestburgh*, 54 A.D.2d 396, 388 N.Y.S.2d 940, 942 (3d Dep't 1976); *Cooper v. Dubow*, 41 A.D.2d 843, 342 N.Y.S.2d 564, 566 (2d Dep't 1973)).

Moreover, Sherman has not established that he had a vested property interest in receiving personal notice of zoning changes. In *Alzamora v. Village of Chester*, 492 F. Supp.2d 425 (S.D.N.Y. 2007), this court considered a procedural due process challenge based on the Village's failure to personally notify a landowner of proposed zoning changes. The court held that absent a vested interest in the property, such notice was not required: "It is axiomatic that, '[u]nder New York law, a property owner has no right to the existing zoning status of his land unless his right has become 'vested.'" 492 F. Supp. at 430 (citing *DLC Mgmt. Corp. v. Town of Hyde Park*, 163 F.3d 124, 130 (2d Cir.1998)). In *DLC Mgmt.*

Corp., the Second Circuit explained the requirements for establishing vesting:

> In order for a right in a particular zoning status to vest, a property owner must have undertaken substantial construction and must have made substantial expenditures prior to the enactment of the more restrictive zoning ordinance. Where . . . there has been no construction or other change to the land itself," a property owner has no right to complete a project permitted under an earlier zoning classification.

163 F.3d at 130 (quoting *In the Matter of Pete Drown Inc. v. Town Board of the Town of Ellenburg*, 229 A.D.2d 877, 879, 646 N.Y.S.2d 205, 206 (3d Dep't 1996)) (internal citation and quotation marks omitted). Because Sherman has not undertaken any construction on the property, he cannot establish entitlement to personal notice on the ground of a vested right.

Finally, while Sherman avers that he was specifically targeted by the Town, has not alleged, nor could he, that the zoning changes of which he complained *only* applied to his property. Cf. Harris v. County of Riverside, 904 F.2d 497, 502 (9th Cir. 1990) (noting that zoning laws "would not ordinarily give rise to constitutional procedural due process requirements," but that singling out plaintiff's property there required personal notice).

vi. Substantive Due Process Claim

To plead a substantive due process claim, a plaintiff must allege facts establishing (1) a cognizable property interest (2) that was invaded in

an arbitrary and irrational manner. *See O'Mara v. Town of Wappinger*, 485 F.3d 693, 700 (2d Cir. 2007); *Natale v. Town of Ridgefield*, 170 F.3d 258, 262-63 (2d Cir. 1999). A plaintiff must plead governmental conduct that "is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Velez*, 401 F.3d at 93 (internal quotation marks omitted). Moreover, "[w]here another provision of the Constitution provides an explicit textual source of constitutional protection, a court must assess a plaintiff's claims under that explicit provision and not the more generalized notion of substantive due process." *Kia P. v. McIntyre*, 235 F.3d 749, 757-58 (2d Cir. 2000) (internal quotation marks omitted).

For the reasons stated in the preceding section, Sherman does not state a substantive due process claim because he is unable to establish a cognizable property interest. But even assuming that Plaintiff had a property interest, he fails to state a substantive due process claim because he has not alleged that the Town and its conspirators engaged in conduct that is "so egregious, so outrageous" as to shock the conscience. *Velez*, 401 F.3d at 93. Plaintiff asserts that the Town has failed to approve his application to develop his property in order (1) to make MareBrook a "de facto nature preserve," and (2) to retaliate against him for instituting several lawsuits against the Town over his application. These types of allegations of "improper motives" and "selective enforcement" on the part of municipal officials fall into the "non-conscience-shocking categor[y.]" *Ruston v. Town Bd. of Skaneateles*, No. 06-CV-927, 2008 WL 5423038, at *5 (N.D.N.Y.

Dec. 24, 2008); *see Eichenlaub v. Twp. of Indiana*, 385 F.3d 274, 285-86 (3d Cir. 2004). Plaintiff's incantation of the words "arbitrary and irrational" is insufficient. *See Twombly*, 550 U.S. at 555 ("formulaic recitations" of elements of claim "will not do"). Substantive due process does not forbid even "arbitrary or capricious" administrative conduct "correctable in state court." *See Ceja v. Vacca*, 503 F. App'x. 20, 21 (2d Cir. 2012) (summary order) (internal quotation marks omitted).

And even if this conduct were egregious, Plaintiff's claim would fail because the substance of his allegations mirror his First Amendment and takings claims, which have already been deemed to survive. *See Rother v. NYS Dep't of Corr. & Cmty. Supervision*, 970 F.Supp.2d 78, 100, No. 12-CV0397, 2013 WL 4774484, at *13 (N.D.N.Y. Sept. 04, 2013) (dismissing claim that "overlaps" with First Amendment, procedural due process and equal protection claims).

Accordingly, Sherman's procedural and substantive due process claims are DISMISSED.

vii. Equal Protection Claims[13]

An Equal Protection claim accrues when the plaintiff "knows or has reason to know" of the harm. *See Cullen v. Margiotta*, 811 F.2d 698, 725 (2d Cir.

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[13] Sherman premises his Equal Protection claim, in part, on his status as a Jewish developer, and animus against the Jewish religion. Compl. ¶¶ 422-434. As indicated above, *supra* fn.10, this Court has previously dismissed his First Amendment freedom of religion claim as frivolous and the Second Circuit deemed his allegations that he was discriminated against because he was Jewish as "insufficient." *Sherman*, 752 F.3d at 567.

1987), *cert. denied*, 483 U.S. 1021 (1987). "[T]he proper focus is on the time of the discriminatory act, not the point at which the consequences of the act becomes painful." *Eagleston v. Guido*, 41F.3d 865, 871 (2d Cir. 1994) (citing *Chardon v. Fernandez*, 454 U.S. 6, 8 (1981). In *Singleton v. City of New York*, 632 F.2d 185 (2d Cir. 1980), *cert. denied*, 450 U.S. 920 (1981), the Second Circuit noted:

> The crucial time for accrual purposes is when the plaintiff becomes aware that he is suffering from a wrong for which damages may be recovered in a civil action. To permit him to wait and toll the running of the statute simply by asserting that a series of separate wrongs were committed pursuant to a conspiracy would be to enable him to defeat the purpose of the time-bar, which is to preclude the resuscitation of stale claims.

Id. at 192. Here, Sherman's Equal Protection claims arise from discrete actions the Town is alleged to have taken which treated his application differently from that of similarly situated developers. All of the cognizable actions, however, took place before January 12, 2009. As with the due process claims, moreover, this one would also fail if not barred.

The Equal Protection clause of the Fourteenth Amendment commands that "all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)). As a preliminary matter, Sherman premises his Equal Protection claim, in part, on his status as a Jewish developer, and animus against the Jewish religion. Compl. ¶¶ 422-434. As indicated above, *supra* fn.10,

this Court previously dismissed his First Amendment freedom of religion claim as frivolous, and the Second Circuit deemed his allegations that he was discriminated against because he was Jewish as "insufficient." *Sherman*, 752 F.3d at 567. Specifically, the Circuit noted:

> He states that the "municipal Defendants" knew that he was Jewish, and that at a Town Board meeting, he heard Town citizens express fear that MareBrook might become a "Hassidic Village" like the nearby Kiryas Joel. He also alleges that a "model home was vandalized with a spray-painted swastika." However, none of this is linked to any Town official. Nor does he allege that any similarly situated non-Jews were treated differently.

Id. Accordingly, for the same reasons his First Amendment and § 1982 claims fail, his Equal Protection claim must also fail to the extent it alleges discrimination based on religion.

Plaintiff also bases his Equal Protection claim on a "class of one" theory," which consists of: (1) intentional disparate treatment, (2) from other similarly situated individuals, (3) without a rational basis for the difference in treatment, and (4) without otherwise claiming membership in a particular class or group. *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). The Court of Appeals has made clear that, in a "class of one" case, "plaintiffs must show an extremely high degree of similarity between themselves and the persons to whom they compare themselves." *Clubside, Inc. v. Valentin*, 468 F.3d 144, 159 (2d Cir. 2006). That is because, in such cases, similarity "is offered to provide an inference that the

plaintiff was intentionally singled out for reasons that so lack any reasonable nexus with a legitimate governmental policy that an improper purpose—whether personal or otherwise—is all but certain." *Neilson v. D'Angelis*, 409 F.3d 100, 105 (2d Cir. 2005), overruled on other grounds by *Appel v. Spiridon*, 531 F.3d 138 (2d Cir. 2008) (per curiam). A plaintiff is required to show that (1) "no rational person could regard the circumstances of the plaintiff to differ from those of a comparator to a degree that would justify the differential treatment on the basis of a legitimate government policy;" and (2) "the similarity in circumstances and difference in treatment are sufficient to exclude the possibility that the defendants acted on the basis of a mistake." *Ruston v. Town Bd. for Town of Skaneateles*, 610 F.3d 55, 60 (2d Cir. 2010) (quoting *Clubside, Inc. v. Valentin*, 468 F.3d 144, 159 (2d Cir. 2006)).

In order to adequately allege an equal protection claim on a "class of one" theory, a plaintiff must demonstrate (1) that he was "intentionally treated differently from others similarly situated," and (2) "that there is no rational basis for the difference in treatment." *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (*per curiam*); *see also Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591 (2010) (examining Olech's reasoning and determining that it does not apply to public employment cases). Stated differently, a plaintiff asserting a "class of one" equal protection claim must allege that the intentional disparate treatment was "wholly arbitrary" or "irrational." *Aliberti v. Town of Brookhaven*, 876 F. Supp. 2d 153, (E.D.N.Y. 2012) (citing Giordano v. City of New York, 274 F.3d 740,

751 (2d Cir. 2001)). The Second Circuit has made clear that both elements of a "class of one" equal protection claim—intentional disparate treatment and lack of rational basis—must be analyzed by comparing the plaintiff to those who are similarly situated. *Neilson*, 409 F.3d at 105.

Without adequate comparators, it is impossible to determine whether there was a legitimate basis for the alleged disparities between Defendants' specific actions with respect to Plaintiff's property and purportedly similar properties or developers. As the Town points out, Sherman utterly fails to identify a *single* other developer that is sufficiently similar to him in terms of the size, nature and scope of the proposed project, or who was subject to the same regulatory regime, much less any other developer with the requisite extremely high degree of similarity to him or his property. *See* Pl.'s Reply Mem. (Doc. 37) at 16; *see also Adam J. v. Village of Greenwood Lake*, 10-CV-1753 (CS), 2013 WL 3357174, at *7 (S.D.N.Y. 2013) (dismissing "class of one" claim where developer failed to identify comparator developing a project that was "identical in all relevant respects" to his own). Plaintiff concedes as much, acknowledging, for example, that his proposal included an on-site golf course and other recreational facilities while the others did not,[14] and that other developers were subject to different zoning requirements. Pl.'s Mem. 27. Since Plaintiff is unable to identify materially similar, let alone identical comparators, the Court's analysis cannot

[14] Though Sherman calls this a "distinction without a difference." Plf.'s Mem. 27.

proceed. Given that Plaintiff has failed to show "an extremely high degree of similarity between themselves and the persons to whom they compare themselves[,]" *Clubside*, 468 F.3d at 159, he cannot sustain an equal protection claim under a "class of one" theory.

Finally, to the extent Sherman bases his Equal Protection Claim on so called "exclusionary zoning," that claim also fails. As the Town points out, even if the claim were cognizable,[15] the only zoning changes at issue were passed between 2003 and 2007, well beyond the limitations period.

Accordingly, Sherman's Equal Protection claim is DISMISSED.

C. Sherman's State Claims

Sherman's sixth through eighth causes of action allege violations of the New York State Constitution;[16] ultimately each one fails on one or more bases. First, his state constitutional claims were subject to the notice requirements of General Municipal Law §§ 50-e and 50-i and Town Law § 67. Sherman did not file his notice of claim until October 6, 2011. *See* Cardoso Dec. Ex. DD. Thus, his

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[15] The claim would also fail because it was not included in the notice of claim as required by Town Law § 67. *See* Notice of Claim submitted by Steven M. Sherman, Exhibit DD to the Declaration of Anthony Cardoso ("Cardoso Dec.") (Doc. 22); *see also Montano v. City of Watervliet*, 47 A.D.3d 1106, 1111 (3d Dep't 2008).

[16] The sixth cause of action alleges a violation of the Equal Protection clause. Compl. ¶¶ 444-47. The seventh cause of action alleges violations of freedom of religion, due process and the right to petition. *Id.* at ¶¶ 448-52. The eighth cause of action alleges a violation of the takings clause. *Id.* at ¶¶ 453-56.

Equal Protection, due process and freedom of religion claims are barred to the extent, as here, that they accrued nintey days prior the filing of the notice. Second, the equal protection, exclusionary zoning and spot zoning claims are nowhere included in the notice, *id.*, thereby divesting this Court of subject matter jurisdiction over those claims. *423 S. Salina St. v City of Syracuse*, 68 N.Y.2d 474, 488-89 (N.Y. 1986), *cert. denied*, 481 U.S. 1008 (1987). Third, there is no private right of action for violations of the New York State Constitution where, as here, alternative remedies exist pursuant to, for example, 42 U.S.C. § 1983 and Article 78. *See Flores v. City of Mount Vernon*, 41 F. Supp.2d 439, 447 (S.D.N.Y. 1999) (finding no private right of action for violations of the New York State Constitution where a plaintiff has alternative damage remedies available § 1983); *see also Ken Mar Dev., Inc. v. Dep't of Pub. Works of City of Saratoga Springs*, 53 A.D.3d 1020, 1025, 862 N.Y.S.2d 202, 206 (3d Dep't 2008) (finding the injunctive and declaratory relief available to petitioner pursuant to CPLR article 78 provides an adequate alternative remedy, rendering the recognition of a constitutional tort unnecessary to effectuate the purposes of the State constitutional protections). Finally, because Sherman's complaints concern the exercise of discretionary acts, the Town is entitled to immunity from his state law claims. *Haddock v. City of New York*, 75 N.Y.2d 478, 484 (1990) (*citing*, *Tango v. Tulevich*, 61 N.Y.2d 34, 40 (1983).

Accordingly, all of Sherman's state law claims are DISMISSED.[17]

D. Laroe's Motion to Intervene

Laroe has moved to intervene as a matter of right pursuant to Rule 24(a)(2) or, alternatively, permissively, pursuant to Rule 24(b). Rule 24(a)(2) provides in relevant part:

> On timely motion, the court must permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a)(2). Intervention as a matter of right requires an applicant to: (1) file a timely motion; (2) show an interest in the litigation; (3) show that its interest may be impaired by the disposition of the action; and (4) show that its interest is not adequately protected by the parties to the action. *Grewal v. Cueno*, No. 13 Civ. 6836 (RA) (HBP), 2014 WL 2095166, at *3 (S.D.N.Y. May 20, 2014) (quoting *In re Holocaust Victim Assets Litig.*, 225 F.3d 191, 197 (2d Cir. 2000)). Rule 24(b) also provides for permissive intervention "[u]pon timely application . . . when an applicant's claim or defense and the main actions have a question of law or fact in common." Fed. R. Civ. P. 24(b)(2). Substantially the same factors as intervention of right are

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[17] Sherman requests leave to re-serve the notice of claim or to deem it timely *nunc pro tunc*. For the reasons set forth above, granting the request would be futile.

considered in determining whether to grant an application for permissive intervention pursuant to Rule 24(b)(2). *Grewal*, 2014 WL 2095166, at *3 (quoting *In re Bank of N.Y. Derivative Litig.*, 320 F.3d 291, 300 (2d Cir. 2003)).

Laroe contends that by virtue of its status as contract vendee, it has equitable title in the property, which it claims to be "synonymous with true ownership" under New York law. Laroe Reply Mem. L. 2. Defendants, on the other hand, argue that Laroe's intervention in this case would be futile because contract vendees lack standing to assert a takings claim, and that Laroe did not in fact have equitable title to the property. Defs. Opp. Mem. L. 9, 11.

Although legal futility is not mentioned in Rule 24, courts have held that futility is a proper basis for denying a motion to intervene. *In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, Nos. 02 MDL 1484 (JFK), 02 Civ. 8472 (JFK), 2008 WL 2594819, at *5 (S.D.N.Y. June 26, 2008) (citing sources). In determining whether the proposed intervention is futile, the Court must view the application on the tendered pleadings—that is, whether those pleadings allege a legally sufficient claim or defense and not whether the applicant is likely to prevail on the merits. *Id.* (quoting *Williams & Humbert, Ltd. v. W & H Trade Marks, Ltd.*, 840 F.2d 72, 74 (D.C. Cir. 1988)). Thus, in considering the sufficiency of Laroe's proposed complaint, the Court employs the same standards as it would apply in considering a motion to dismiss for failure to state a valid claim. *Id.* Specifically, the Court must accept all allegations in the proposed complaint as true; it is

not required, however, to accept as true conclusory allegations or a legal conclusion couched as a factual allegation. *Id.* (internal quotation marks and citations omitted).

The Second Circuit has held that "[o]nly the owner of an interest in property at the time of the alleged taking has standing to assert that a taking has occurred." *U.S. Olympic Comm. v. Intelicense Corp., S.A.*, 737 F.2d 263, 268 (2d Cir. 1984) ("USOC"); *see also Fitzgerald v. Thompson*, 353 F. App'x 532, 534 (2d Cir. 2009) (summary order) (citing *id.* for the same), *cert. denied*, 561 U.S. 1038 (2010). Accordingly, courts in this Circuit have found that contract vendees lack standing to assert a takings claim. For example, in *R & V Development, LLC v. Town of Islip*, No. 05 Civ. 5033 (DRH), 2007 WL 14334, at *1 (E.D.N.Y. Jan. 3, 2007), the plaintiff alleged that he was a vendee to a contract for the purchase of a parcel of real property in Islip, New York, and that the town zoning board had denied his application for a variance for single-family housing on the property. The court relied on *USOC* to dismiss the takings claim on the basis of the plaintiff's status as contract vendee rather than property owner at the time of the alleged taking. *Id.* at *2. Similarly in *Gebman v. New York*, No. 07 Civ. 1226 (GLS), 2008 WL 2433693, at *1 (N.D.N.Y. June 12, 2008), the plaintiff alleged various injuries from a corporation's sale of real property to the City of Beacon. There, "ownership [was] not in dispute" because plaintiff, by his own admission, was "a contract vendee holding interest in the development of parcels . . . downstream." *Id.* at *4 (internal quotation marks and citation omitted). The court

observed that while the defendant had not cited any authority for the proposition that only an owner of property may assert a takings claim, that proposition appeared to be a correct statement of law based on the Second Circuit's holding in *USOC*. *Id.* at *5. The court therefore concluded that the plaintiff lacked standing as a contract vendee to assert a takings claim and dismissed the cause of action. *Id.*

Laroe has not provided any reason to depart from the reasoning of *R & V Development* and *Gebman*.[18] First, even if Laroe had equitable title in the property based on the execution of his agreement with Sherman in 2003, such status would have established a legal relationship between Laroe and Sherman, but not between Laroe and Defendants. *See Kendle v. Town of Amsterdam*, 36 A.D.3d 985, 986 (3d Dep't 2007) ("Execution of a land sale contract provides the purchaser with equitable title to the property. It creates privity and duties between the purchaser and seller but not between an equitable title holder and third parties.") (internal citation omitted). Second, Laroe repeatedly acknowledges in his proposed complaint and papers that he was a contract vendee at the time of the alleged taking. *See, e.g.*, Laroe Compl. ¶ 86 (stating that Laroe "became contract vendee of MareBrook and Other Projects in order to create a reasonable residential development."); Laroe Mem. L. 6 ("In New York, a land contract vendor [Sherman] holds legal

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[18] Laroe's attempts to distinguish *R & V Development* and *Gebman* are both superficial and unavailing. *See* Laroe Reply Mem. L. 6, 7 (stating, *inter alia*, that *R&V* "presents a clear example of the maxim 'bad lawyering produces bad law,'" and that the Court is not bound by the rulings of either case).

title, while the land contract vendee [Laroe] holds equitable title."); *id.* at 7 ("[H]olding equitable title gives the land contract vendee full rights of ownership."); Laroe Reply Mem. L. 6 ("[U]nder New York law, a contract vendee is the true owner."). Accordingly, based on the Second Circuit's clear guidance in *USOC*, Laroe does not have standing to bring a takings claim based on its status as contract vendee to the property.[19] Laroe's motion to intervene is therefore DENIED.[20]

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[19] Laroe's reliance on *Johnson v. State*, 10 A.D.3d 596 (2d Dep't 2004), for the argument that it should have standing here because this case presents issues analogous to a condemnation is unavailing. In that case, the Second Department noted that a claimant seeking compensation for condemned property may, in appropriate circumstances, seek recovery by demonstrating an equitable interest therein as opposed to legal title. *Id.* at 597. However, the fact that this is a takings case and not a condemnation proceeding is not merely "a distinction without a difference," *see* Laroe Mem. L. 8, and the Court is persuaded by the above cases denying standing to contract vendees in this context.

Moreover, the various documents Laroe has submitted in support of its motion only confirm that standing is inappropriate here. First, the sale of the property from Sherman to Laroe, as set forth in the original agreement between the parties (the "Agreement"), was expressly conditioned on Sherman's procurement of the approvals and permits from the planning board. *See, e.g.*, Affirmation of Joseph J. Haspel ("Haspel Aff."), Ex. D ("2003 Contract of Sale"), § 4(A); id. at § 19 (stating that closing of title would be conditioned on the authorization of the planning board). Second, the April 25, 2012 arbitration ruling issued by the Rabbinical Court of Mechon L'Hoyroa, which—according to Intervenor-Applicant—"gave Laroe full rights in the Real Property," postdated Sherman's commencement of the instant action. Laroe Mem. L. 6. Accordingly, because only the owner of an interest in a property at the time of the alleged taking has

standing on a takings claim, Laroe's late-filed arbitration ruling cannot save the instant motion. *See* Haspel Aff., Ex. F ("Arbitration Ruling") ("Being that Mr. Steven Sherman failed to pay [Laroe] the amount of $2,500,000, therefore, as of today, the aforementioned properties belong to [Laroe], and [it is] the sole owner[] of the aforementioned properties."). Additionally, in a May 7, 2013 settlement agreement, Laroe and Sherman modified the terms of the Agreement so that closing under the Agreement would occur upon the release of TD Bank's mortgages encumbering the property. See Haspel Aff., Ex. E ("2013 Settlement Agreement"), § 6; Laroe Mem. L. 5 ("Notwithstanding the parties [sic] acknowledgment of full payment by Laroe, in order to protect Laroe, closing would not occur until the foreclosure proceeding was resolved."). Finally, as the Referee Report of Sale makes clear, the TD Bank foreclosure sale occurred on May 21, 2014, when the bank—not Laroe—took ownership of the property. Haspel Aff., Ex. H, § 7.

[20] In addition, even if the instant motion were not futile, it is not clear that it satisfies Rule 24's timeliness requirement. The timeliness of an intervention motion is a matter left to the district court's discretion. *Peterson v. Islamic Republic of Iran*, 290 F.R.D. 54, 57 (S.D.N.Y. 2013). In determining timeliness, the Court may consider, *inter alia*: (a) the length of time the applicant knew or should have known of its interest before making the motion; (b) prejudice to the existing parties resulting from the applicant's delay; (c) prejudice to the applicant if the motion is denied; and (d) the presence of unusual circumstances militating for or against a finding of timeliness. *Id.* (quoting *MasterCard Int'l Inc. v. Visa Int'l Serv. Ass'n, Inc.*, 471 F.3d 377, 389 (2d Cir. 2006)). "While the Court may consider . . . 'the point to which the suit has progressed' to determine timeliness, that factor is not dispositive.'" *Id.* (quoting *NAACP v. New York*, 413 U.S. 345, 365-66 (1973)).

Here, Laroe claims that it made the instant application at its "earliest opportunity." Laroe Mem. L. 11. However, its own papers cast doubt on that assertion. According to Laroe, it learned about the case after Defendants initially moved to dismiss. *Id.* But, "[b]ased upon the issues presented in the Motion to Dismiss, Laroe determined to await the outcome of the motion before taking any action." *Id.* Accordingly, by

III. Conclusion

For the reasons stated above, Defendants' motion to dismiss is **GRANTED** in part and **DENIED** in part. Laroe's motion to intervene is **DENIED**. The Clerk of the Court is respectfully requested to terminate the motions, Doc. 21 and Doc. 24. The parties are directed to appear for a status conference on Wednesday, April 23, 2015 at 10:30.

It is SO ORDERED.

Dated: March 31, 2015
New York, NY

/s/
Edgardo Ramos, U.S.D.J.

Laroe's own admission, it filed the instant motion well over one year after it had knowledge of its interest in the case, and almost two and a half years after the commencement of the litigation. However, given the conclusion that the instant motion would be futile, the Court need not decide whether it was timely.